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No. 00-

IN THE

Supreme Court of the United States

GEORGE DUNCAN,

Petitioner,

v.

SHERMAN WALKER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a prior federal habeas corpus petition is an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2), which provides that the one-year statute of limitations for federal habeas corpus petitions set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is tolled during the pendency of such an application.

2. Whether a prior federal habeas corpus petition, dismissed without prejudice for failure to indicate that the claims it asserts have been exhausted in state court, is "properly filed" under 28 U.S.C. § 2244(d)(2) and therefore tolls the one-year AEDPA statute of limitations during its pendency.

PARTIES TO THE PROCEEDING

Sherman Walker was the petitioner(-appellant) in the courts below and is the respondent in this Court. Christopher Artuz was the respondent(-appellee) in the courts below. George Duncan is substituted for Mr. Artuz, now retired, as the Superintendent of the Great Meadow Correctional Facility in which respondent Walker is now imprisoned. Mr. Duncan is the petitioner in this Court.

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OPINIONS BELOW

The opinion of the Second Circuit, reported at 208 F.3d 357 (2d Cir. 2000), is set forth in Appendix A. The unreported Memorandum and Order of the district court dated May 6, 1998 is set forth in Appendix B. The unreported Memorandum and Order of the district court dated July 9, 1996 is set forth in Appendix C.

STATEMENT OF JURISDICTION

The order of the Court of Appeals was entered on March 27, 2000. The 90-day period for filing a petition for certiorari ended on June 25, 2000. By order dated June 19, 2000, Justice Ginsburg granted an extension of the 90-day period to file a petition to and including July 25, 2000. This petition is filed prior to that date. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) (1993).

STATUTORY PROVISION INVOLVED

The Anti-Terrorism and Effective Death Penalty Act of 1996, P.L. 104-132, §§ 101, 106, 110 Stat. 1214, 1217 (1996), provides in pertinent part:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. . . .
>
> (2) The time during which a properly filed application for State post-conviction or other

> collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d) (Supp. 2000).

STATEMENT OF THE CASE

A. Introduction

Before 1996, there was no statute of limitations for federal habeas corpus proceedings. The only provision dealing with the effect of the passage of time between a state conviction and the filing of a federal habeas corpus petition was Rule 9(a) of the Rules Governing Section 2254 Cases, which permits dismissal of a petition if a State "has been prejudiced in its ability to respond to the petition by delay in its filing." 28 U.S.C. § 2254 Rule 9(a) (1994). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), P.L. 104-132, §§ 101, 106, 110 Stat. 1214, 1217 (1996), introduced 28 U.S.C. § 2244(d) into the law of habeas corpus. That provision establishes a one-year statute of limitations for applications for the writ, running from the date on which the judgment of conviction became final. With respect to convictions that became final prior to AEDPA's effective date of April 24, 1996, all the circuits to address the issue, including the Second Circuit, have established a one-year grace period after the effective date of the statute in which prisoners may apply for the writ. *See Ross v. Artuz*, 150 F.3d 97, 100-101 (2d Cir. 1998) (citing cases).

Section 2244(d)(2) tolls the one-year limitations period during the pendency of a "properly filed application for State post-conviction or other collateral review." The circuits have agreed that the tolling provision of § 2244(d)(2) applies to the one-year grace period as well as to the one-year

limitations period. *See Bennett v. Artuz*, 199 F.3d 116, 119 (2d Cir. 1999) (citing cases), *cert. granted sub nom, Artuz v. Bennett*, 120 S. Ct. 1669 (2000) (No. 99-1238).

The questions presented in this petition involve the construction of the tolling provision applicable to the one-year AEDPA limitations and grace periods: can prior federal habeas corpus petitions toll the limitations and grace periods during their pendency, and if so, what is the meaning of the "properly filed" requirement as applied to such prior federal petitions so as to invoke the toll?

B. Facts and Procedural History

Respondent Sherman Walker was convicted and sentenced for three distinct acts of and indictments for robbery. He initially was sentenced on February 13, 1992, following his conviction of two counts of robbery after a jury trial in the New York Supreme Court, New York County. The judgment was affirmed by New York State Supreme Court's Appellate Division, First Department. *See People v. Walker*, 632 N.Y.S.2d 68 (N.Y. App. Div.), *leave to appeal denied*, 641 N.Y.S.2d 238 (N.Y. 1995). Thereafter, on February 27, 1992, after a jury trial in the Supreme Court, Queens County, Walker was sentenced following another conviction for robbery. This judgment similarly was affirmed by the Appellate Division, Second Department. *See People v. Walker*, 628 N.Y.S.2d 951 (N.Y. App. Div. 1995), *appeal dismissed*, 641 N.Y.S.2d 608 (N.Y. 1996). Finally, on June 16, 1992, pursuant to a plea of guilty in the Supreme Court, Queens County, Walker again was convicted of robbery and sentenced. This judgment was likewise affirmed by the Appellate Division, Second Department. *See People v. Walker*, 628 N.Y.S.2d 950 (N.Y. App. Div. 1995), *appeal dismissed*, 641 N.Y.S.2d 608 (N.Y. 1996).

Walker filed an application for a writ of error coram nobis with respect to the latter two convictions in the Appellate Division, Second Department, which determined against him on March 18, 1996. *See People v. Walker*, 639 N.Y.S.2d 932 (N.Y. App. Div. 1996). Thereafter, in a single document dated April 10, 1996, Walker filed a complaint pursuant to 42 U.S.C. § 1983 and a petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of New York. He claimed that his detention for each of his three robbery convictions was attributable to a violation of his federal constitutional right to the effective assistance of counsel. The district court dismissed the petition and civil rights complaint without prejudice in a Memorandum and Order dated July 9, 1996 (Appendix C). The court dismissed the habeas corpus petition "for [Walker's] failure to adequately set forth his claim * * * *. Because this court cannot determine which issues have been properly exhausted in State court, the essential allegations of a habeas corpus action have not been presented." (App. C, 20a).

On May 20, 1997, Walker filed a second habeas corpus petition in the district court for the Eastern District of New York. The petition challenged only the third conviction, dated June 16, 1992, claiming that Walker's right to counsel had been denied at the lineup and that the People had failed timely to provide a copy of the detective's affidavit attesting to the circumstances warranting petitioner's inclusion in the lineup. (App. C, 20a).

On August 22, 1997, petitioner herein moved to dismiss Walker's petition as untimely under the one-year limitations period fixed by 28 U.S.C. § 2244(d). The basis of the motion was that more than one year had elapsed since Walker's state-court conviction had become final on January 5, 1996, when the Court of Appeals denied leave to appeal in *People v. Walker*, 641 N.Y.S.2d 608 (N.Y. 1996).

The district court dismissed the second petition as time-barred in a Memorandum and Order dated May 6, 1998 (Appendix B). The court applied the then-applicable rule of the Second Circuit, *see Peterson v. Demskie*, 107 F.3d 92, 93 (2d Cir. 1997), that petitions challenging convictions which became final prior to AEDPA must be filed within a "reasonable time" after AEDPA's effective date of April 24, 1996.[1] The district court held that the petition was not filed within a reasonable time because it was not filed until "over one year and four months after the completion of [Walker's] direct appeal, over one year after the effective date of AEDPA, and almost one year after his first habeas petition was dismissed." (App. B, 15a).

By order entered December 1, 1998, the Second Circuit granted petitioner a certificate of appealability. *See* 28 U.S.C. § 2253(c) (1996). The parties were ordered to brief the following issues:

> 1. Whether the petitioner-appellant's first petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 tolled the period of limitations set forth in 28 U.S.C. § 2244(d)(2), and 2. Whether the limitations period in section 2244(d) may be equitably tolled where the prior, timely-filed section 2254 petition was dismissed without prejudice for failure to exhaust all claims and the petitioner-appellant did not file a new petition stating only exhausted claims until after the one-year grace period noted in *Ross v. Artuz*, 150 F.3d 97 (2d Cir. 1998).

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1. Shortly after the district court's decision, the Second Circuit in *Ross v. Artuz*, 150 F.3d 97 (2d Cir. 1998) adopted the one-year grace period for habeas corpus petitions challenging pre-AEDPA convictions, running from the April 24, 1996 effective date of AEDPA.

The court further ordered that counsel be appointed to represent the petitioner-appellant. In briefing the first issue, the parties addressed whether federal habeas corpus petitions are "applications for State post-conviction or other collateral review" as stated by § 2244(d)(2).

In an opinion dated March 27, 2000, the Second Circuit reversed the district court (Appendix A). It concluded that a federal habeas corpus petition is an "application for State post-conviction or other collateral review" under § 2244(d)(2). Therefore, the court held, Walker's second petition was timely because the one-year grace period was tolled during the three-month pendency of his initial federal habeas petition. In finding that the tolling provision encompasses federal habeas corpus petitions, the court reasoned that

> "State" modifies only the word "post-conviction," and the phrase "other collateral" is to be given its naturally broader meaning. The disjunctive "or" in the statute creates a distinct break between the two kinds of review [whereas] applying "State" to both of the disjunctive phrases would create a linguistic oddity * * * * "State other collateral review" is an ungainly construction that we do not believe Congress intended.

208 F.3d at 360. Moreover, the Second Circuit added, " " 'State post-conviction review' means all collateral review of a conviction provided by a state and the phrase "other collateral review" would be meaningless if it did not refer to federal habeas petitions." *Id.* at 360.

The Second Circuit also concluded that including federal habeas petitions within the scope of § 2244(d)(2)'s tolling provision would not be inconsistent with the overall objective of AEDPA to place finite restrictions on the time for such

petitions. In the court's view, tolling the limitation period during the pendency of a first federal petition would not create a loophole permitting easy evasion of the limitations period, because successive petitions would not satisfy the "properly filed" proviso of the statute if the first petition had been dismissed on the merits or with prejudice. *Id.* Instead, according to the court, including federal habeas corpus petitions within the scope of § 2244(d)(2) will reward petitioners for filing as soon as possible, thus promoting the statutory objective of efficiency in the review process. *See id.* at 360-361.

REASONS FOR GRANTING THE WRIT

I. There is a conflict among the lower federal courts on the significant question whether the AEDPA tolling provision encompasses federal habeas corpus petitions.

This Court should grant certiorari to resolve the division among the federal courts over whether the phrase "State post-conviction or other collateral review" in AEDPA's tolling provision encompasses federal habeas corpus review. The decisions are squarely in conflict on this important issue. In the present case, the Second Circuit held that "State" does not modify the term "other collateral review" in the language of the statutory provision. Thus, the court reasoned, a prior federal habeas corpus petition falls within § 2244(d)(2), and serves to toll the one-year grace period for convictions preceding AEDPA's effective date (as well, therefore, as the one-year limitations period for post-enactment convictions). As the court below acknowledged, *see* 208 F.3d at 359, its decision squarely conflicts with the decision of the Third Circuit in *Jones v. Morton*, 195 F.3d 153 (3d Cir. 1999). The Third Circuit in *Jones* concluded that "Congress clearly intended that the word 'State' would be read to modify both 'post-conviction' and 'other collateral,' so that tolling would be afforded under § 2244(d)(2) for various forms of state review only." *Id.* at 159.

The conflict between the present case and *Jones* extends beyond the results reached by the two courts to the particulars of their reasoning. The Second Circuit stated it was reading the provision in question "naturally." 208 F.3d at 359. The Third Circuit was persuaded that its own opposite interpretation was the " 'natural reading of the statute.' " 195 F.3d at 158 (quoting *Sperling v. White*, 30 F. Supp. 2d 1246, 1250 (C.D. Cal. 1998)). The Second Circuit stated that "including federal petitions within the meaning of Section 2244(d)(2) . . . promot[es] the statutory objective of efficiency in the review of State criminal judgments." 208 F.3d at 360-61. The Third Circuit, by contrast, found "nothing in the policy concerns behind AEDPA's enactment" to suggest that the "collateral review" of § 2244(d)(2) encompasses federal habeas corpus petitions. *Jones*, 195 F.3d at 159.

Other circuits also have taken a view of § 2244(d)(2) that inescapably conflicts with that of the Second Circuit. For example, in *Rhine v. Boone*, 182 F.3d 1153 (10th Cir. 1999), the Tenth Circuit considered whether the one-year grace period under § 2244(d)(2) was tolled during the pendency of a petition filed with this Court for a writ of certiorari to review a state court's denial of post-conviction relief. The court held it was not tolled, concluding that "in the wording of § 2244(d)(2), 'State' modifies the phrase 'post-conviction review' and the phrase 'other collateral review,' " and a petition for certiorari "is simply not an application for state review of any kind." *Id.* at 1156; *see also Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999) (following *Rhine* in concluding that petition for writ of certiorari in state-court post-conviction proceeding "is not an application for 'State' review that would toll the limitations period").

The conflict among the circuit courts is mirrored by conflicting decisions of the federal district courts of California, which (like the Second Circuit and Third Circuit in *Walker* and *Jones*, respectively) have reached opposite conclusions while invoking the same principles of statutory construction. *Compare Barrett v. Yearwood*, 63 F. Supp. 2d 1245, 1250 (E.D. Cal. 1999) ("[t]he plain meaning of § 2244(d)(2) is that the statute of limitations is tolled during the pendency of any properly filed federal habeas corpus petition"), *with Sperling v. White*, 30 F. Supp. 2d 1246, 1250 (C.D. Cal. 1998) ("[a] natural reading of the statute concludes that section 2244(d)(2) does not contemplate tolling limitations during the time a habeas petition is pending in federal court").

Nor does the conflict between the present decision and those of the Third, Fifth and Tenth Circuits pertain only to convictions that became final prior to the effective date of AEDPA and to which the judicially-created "grace period" applies. As *Rhine* and *Barrett* — both of which deal with state convictions finalized after April 24, 1996 — make clear, tolling pursuant to § 2244(d)(2) applies — indeed, more literally — to the one-year statute of limitations for habeas corpus petitions with respect to such post-AEDPA convictions. Pre-AEDPA convictions receive the benefit of the one-year "grace period" pursuant to judicial rule, while later convictions are subject to a one-year limitations period mandated by statute. Both periods are tolled during the pendency of "State post-conviction or other collateral review." The interpretation of § 2244(d)(2) arrived at in one context applies equally in the other.

The importance of the issue presented here is indicated by the number of cases potentially affected by its resolution. There were 20,251 habeas corpus proceedings commenced in the federal courts during the year ending September 30, 1999. *See* 1999 Director's Ann. Rep., Jud. Bus. of the U.S.

Cts 146. The number was in the same range for the preceding years — 20,897 in 1998 and 21,621 in 1997. *See id.* Exhaustion of state remedies is required before any of these petitions may be entertained in the federal courts. *See* 28 U.S.C. § 2254(b)(1)(A), (c) (Supp. 2000); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Studies have suggested that a significant number of such federal petitions are dismissed for failure to exhaust. *See* Richard H. Fallon, *et al.*, *Hart and Wechsler's The Federal Courts and The Federal System*, 162 (4th ed. Supp. 1999) (citing Allen, Schachman & Wilson, *Federal Habeas Corpus and its Reform: An Empirical Analysis*, 13 Rutgers L.J. 675, 695, 703 (1982); Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 Harv. L. Rev. 321, 356-61 (1973)). Thus, the issue of the tolling effect of an initial federal habeas corpus petition on the timeliness of a subsequent petition "may not be uncommon." *Kethley v. Berge*, 14 F. Supp. 2d 1077, 1079 (E.D. Wis. 1998). It will arise whenever an inmate files a habeas petition after his prior petition containing unexhausted claims has languished in the district court before dismissal, or when the original unexhausted petition was filed with only a short time remaining in the one-year limitations period. *See* 1 James S. Liebman and Randy Hertz, *Fed. Hab. Corp. Prac. & Procedure* § 5.16 at 229-231 (3d ed. 1998) (discussing circumstances in which second petition will be time-barred).

Thus, there is an inescapable conflict among the federal courts over the interpretation of § 2244(d)(2). Resolution of the issue will produce a rule of decision applicable in many cases, and perhaps dispositive on the significant matter of a state prisoner's access to federal habeas corpus review. The issue is, moreover, binary in its possible resolutions: the statute either does or does not encompass federal habeas corpus petitions within "other collateral review." Both possible views have now been taken by the circuit courts, with no chance that a middle way or a different approach

will emerge from further lower-court consideration. Only a decision by this Court can produce a consistent statutory interpretation on this important and recurrent issue.

II. The Decision Below Is Legally Erroneous.

The court below erred in interpreting § 2244(d)(2), misapprehending both its literal terms and the provision's connection with other sections of AEDPA.

The Second Circuit first erred in concluding that its reading of the statute is more "natural" than that of the courts with which it disagrees. It is true that the disputed phrase of § 2244(d)(2) — "State post-conviction or other collateral review" — should be given its "most natural reading." *McNeil v. United States*, 508 U.S. 106, 112 (1993). That reading requires that the words of the phrase be read in order and together rather than uncoupled from each other, as the Second Circuit attempted. In the language at issue "[t]here is a unity of verbal structure that is a symptom of an inner unity, a unity of plan and function." *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 378 (1933).

The Second Circuit stated that "[t]he disjunctive 'or' in the statute creates a 'distinct break' between the two kinds of review." 208 F.3d at 359. In fact, the grammatical incompleteness of the first half of the phrase renders the break less than "distinct." To the court below,

> applying "State" to both disjunctive phrases would create a linguistic oddity because the statute would refer to "a properly filed application" for "State post-conviction * * * review" or "State * * * other review." "State other *collateral* review" is an ungainly construction that we do not believe Congress intended.

Id. at 359-360. It is the Second Circuit's reading, however, that is unnatural, for it disturbs the unity of the phrase's structure.

If Congress had wanted to create a complete disjunction between the two halves of the phrase "State post-conviction or other collateral review," it would have achieved grammatical closure by inserting the word "review" after "post-conviction" in the first half of the phrase. The word "review," however, appears only once, at the end of the phrase. The most "natural" reading of the statute is that Congress intended the entire phrase as a single unit, with "State" modifying the only noun in the phrase — "review" — at the point at which the noun appears.

As the Second Circuit acknowledged, its own interpretation effectively inserts the word "review" before "or." *See* 208 F.3d at 360. Congress easily could have drafted such a statute, but it did not, and its failure to do so means that the interpretation that such a statute would have demanded must be rejected. *See, e.g., West v. Gibson*, 527 U.S. 212, 220 (1999) (rejecting an interpretation that Congress "could easily" have embodied in the plain language of a statute).

That the reading of the statute offered herein is the natural reading is suggested by the failure of scholars to see even a possible disagreement here. Pertinent treatises state unequivocally that section 2244(d)(2) contemplates only state-court proceedings. *See* Larry W. Yackle, *Postconviction Remedies* 346 (1st ed. Supp. 2000); Richard H. Fallon, *et al., Hart and Wechsler's The Federal Courts and the Federal System* 162 (4th ed. Supp. 1999); 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* 229-30 (3d ed. 1998).

Comparison to AEDPA provisions further demonstrates that Congress meant to confine the "review" contemplated by § 2244(d)(2) to state-court proceedings. 28 U.S.C. § 2263(b) (Supp. 2000), for example, parallels § 2244(d)(2) in tolling the 180-day statute of limitations fixed by

§ 2263(b)(1) for habeas corpus proceedings in capital cases. Section 2263(b)(2) provides for tolling "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final state court disposition of such petition." By providing for tolling only until the final *state*-court disposition, Congress made clear that only state "post-conviction * * * or other collateral" proceedings are contemplated by this provision. The identical words appearing in 2244(d)(2) should receive the same interpretation, for it is a " 'normal rule of statutory construction that " 'identical words used in different parts of the same act are intended to have the same meaning.' " ' " *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (citations omitted); *see also Rhine v. Boone*, 182 F.3d at 1156 (limiting § 2244(d)(2) to state-court post-conviction review); *Ott v. Johnson*, 192 F.3d at 513 (same).

Moreover, when Congress intended in other provisions of AEDPA to refer to both state and federal post-conviction proceedings, it did so unambiguously. Thus, 28 U.S.C. § 2254(i) (Supp. 2000) provides that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2261(e) (Supp. 2000) makes the identical limitation in capital cases, providing that "[t]he ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief," and that "[t]his limitation shall not preclude the appointment of different counsel * * * at any phase of State or Federal post-conviction proceedings." Likewise, 28 U.S.C. § 2264(a)(3) (Supp. 2000) specifies that a district court may only consider a claim not raised in the state courts if, *inter alia*, the claim is "based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State and Federal post-conviction review." Thus, when Congress intended in AEDPA

to refer to both state and federal post-conviction or collateral review, it did so expressly. Had Congress intended § 2244(d)(2) to apply to federal habeas proceedings, it would "have used language more obviously targeted" to the purpose. *Martin v. Hadix*, 527 U.S. 343, 354 (1999).

The natural meaning of the phrase "State post-conviction or other collateral review" confines the "review" in question to "State" proceedings. This reading of § 2244(d)(2) is reflected in the use of both the same and contrasting terms elsewhere in AEDPA. Accordingly, the Second Circuit erred in its interpretation of § 2244(d)(2), and this Court should grant certiorari to correct the legal error.

III. The Interrelationship of the Issues In *Artuz v. Bennett* and the Present Case Suggests That This Court Should Either Grant the Petition or Hold the Petition Until Disposition of *Bennett*.

This Court's grant of certiorari in *Artuz v. Bennett*, 120 S. Ct. 1669 (2000) (No. 99-1238), underscores the importance of the questions presented in this case. Like the present case, *Bennett* requires interpretation of the tolling provision of § 2244(d)(2) and involves a question of when a prisoner's effort to challenge a final state-court conviction tolls the AEDPA statute of limitations. It is possible, moreover, that the Court's interpretation of the statutory provision, purpose, and the specific terms at issue in *Bennett* will prove dispositive for the present case, which involves adjacent statutory language.

At issue in *Bennett* is the meaning of the portion of § 2244(d)(2) requiring that applications for review be "properly filed" in order to toll the statute of limitations. The Second Circuit in *Bennett* held that a state-court application for post-conviction review is "properly filed" merely if it is submitted in accordance with state procedural

requirements, such as those governing the time and place for filing, even if it is subject to a mandatory procedural bar under state law. 199 F.3d at 121-123. The question presented in *Bennett* is whether a "state court post-conviction application [is] 'properly filed' [under § 2244(d)(2)] if it is filed in [a] court that does not have power to hear [the] merits of [the] application." 68 U.S.L.W. 3649 (April 18, 2000).

This Court's determination in *Bennett* of whether and when an application for review of a state-court conviction is "properly filed" will have bearing on the present case. Even if Walker's first federal habeas corpus petition was an application for "collateral review" encompassed by § 2244(d)(2), it also must have been "properly filed" in order to toll the statute of limitations. If, however, a "properly filed" petition is one of which dismissal is not required by federal law, then Walker's petition was arguably not "properly filed," because its dismissal for failure to exhaust state remedies was mandatory as a matter of federal law. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims."). If Walker's first federal petition was not properly filed, the question of whether it is covered by the "other collateral review" portion of § 2244(d)(2) would be entirely academic with respect to this case.

The Second Circuit has recognized the connection between the issue presented in *Bennett* and the issue it addressed in the present case. The issue was subsumed within the first question framed by the court in its order granting a certificate of appealability, which predated the decision in *Bennett*: "whether [Walker's] first petition tolled the period of limitations set forth in 28 U.S.C. § 2244(d)(2)." Accordingly, the issue whether or nor Walker's first federal habeas petition was "properly filed" was an alternative basis for affirming the district court's dismissal of Walker's present petition.

Moreover, this Court's interpretation of the scope of the "properly filed" requirement and the tolling provision in general necessarily will affect the consequences of including or excluding prior federal petitions within the tolling provision in AEDPA. The text of the Second Circuit's decision in the present case recognizes the connection between the two issues. In rejecting the argument that including federal habeas petitions within the scope of § 2244(d)(2)'s tolling provision would be inconsistent with AEDPA's objective of placing finite restrictions on the time within which habeas petitions may be filed, the court reasoned that

> allowing Walker to exclude the time during which his first federal habeas petition was pending does not create a loophole in the law. The tolling provision by its terms already pertains only to "properly filed application[s]." 28 U.S.C. § 2244(d)(2). Thus, for example, successive petitions arguably would not toll the one-year period.

208 F.3d at 360. In other words, in the Second Circuit's view, a particular interpretation of the term "properly filed" helps justify its statutory interpretation of the "other collateral review" provision. Indeed, the Second Circuit's potentially "saving" interpretation of "properly filed" herein may not be consistent with its own holding in *Bennett*, in which it squarely held that an inquiry into whether a state-court application was "properly filed" entails no examination of the merits of the application.

Central to the Second Circuit's decision in *Bennett* was its view of federal-state comity. In the Second Circuit's view,

> [d]etermining whether a pending state-court motion is procedurally barred under a state law

> . . . is beyond the appropriate role of a federal court in addressing whether a state post-conviction application was "properly filed." It would involve federal courts in making determinations as to the proper outcome of pending state proceedings based on state law when a state court is positioned to make the very same decision.

Bennett, 199 F.3d at 122. The same consideration will not arise in a federal court's determination of whether a federal habeas petition is procedurally barred, for it is not beyond the appropriate role of a federal court to make such an assessment. Indeed, Rule 4 of the Rules Governing Section 2254 Cases contemplates just such a role. Depending on the outcome of *Bennett* and this Court's view of the "other collateral review" provision, this distinction may be critical in applying the "properly filed" requirement to prior federal habeas petitions. The present case offers an opportunity either to resolve the issue or indicate that it need not be resolved.

The issue this Court already has agreed to resolve in *Bennett* thus arises in and has unavoidable implications for the present case. Especially in view of the compelling considerations otherwise warranting review by this Court, the instant petition should be granted so that the entirety of 2244(d)(2) is before the Court in resolving the important question whether the pendency of a federal habeas petition dismissed for nonexhaustion tolls the limitations period. At the very least, the Court should hold the petition pending its decision in *Bennett* for consideration in light of that case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted or held for consideration in light of this Court's decision in *Artuz v. Bennett*, No. 99-1238.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED MARCH 27, 2000

Sherman WALKER,

Petitioner-Appellant,

v.

Christopher ARTUZ, Superintendent,

Respondent-Appellee.

Docket No. 98-2572

United States Court of Appeals,
Second Circuit.

Argued Sept. 15, 1999

Decided: March 27, 2000

* * *

Before: WALKER, LEVAL, and POOLER, Circuit Judges.

POOLER, Circuit Judge:

Sherman Walker appeals from the May 18, 1998, judgment of the United States District Court for the Eastern District of New York (Sterling Johnson, Jr., *Judge*) dismissing his petition for a writ of habeas corpus.

Appendix A

BACKGROUND

A jury convicted Walker of first-degree robbery in Queens County Supreme Court in June 1992, and the state Appellate Division affirmed the conviction in June 1995. The New York Court of Appeals denied Walker leave to appeal his conviction on January 15, 1996. Walker's conviction therefore became final on April 14, 1996, when his time expired to seek direct review by writ of certiorari to the United States Supreme Court. Walker pursued a state collateral attack on his conviction and petitioned for a writ of error *coram nobis,* which the Appellate Division denied on March 18, 1996. According to appellant, he also filed a separate motion in February 1996 to vacate his conviction in state court, which denied the motion in April 1996.

In a single document dated April 10, 1996, Walker filed in federal court a complaint pursuant to 42 U.S.C. § 1983 and a habeas corpus petition pursuant to 28 U.S.C. § 2254. The district court for the Eastern District of New York dismissed the complaint and petition without prejudice on July 9, 1996, because (1) Walker failed to state a Section 1983 claim against his court-appointed lawyers, who were not state actors; and (2) it was not apparent from the petition what issues Walker had raised in his direct criminal appeals and whether Walker had exhausted his state-court remedies. *See Walker v. Legal Aid Soc'y,* No. 96 CV 2946, 1996 WL 391585, at *1-2 (E.D.N.Y. July 9, 1996). About 11 months later, Walker filed in federal court a second habeas corpus petition dated May 20, 1997. In a memorandum and order dated May 6, 1998, Judge Johnson dismissed the second petition as untimely pursuant to the Antiterrorism and

Effective Death Penalty Act of 1996 ("AEDPA") because Walker filed it more than one year after the effective date of the AEDPA, or April 24, 1996. Judge Johnson also noted that Walker filed his second habeas petition more than one year after completing his direct criminal appeal and nearly one year after the court dismissed his first habeas petition. On December 18, 1998, we granted Walker a certificate of appealability regarding these two issues: first, whether Walker's first habeas petition tolled the one-year statute of limitations, and second, whether equitable tolling applied to make Walker's second habeas petition timely. Because we answer the first question in the affirmative, we need not reach the issue of equitable tolling. Walker's appeal presents questions of law that we review *de novo*.

DISCUSSION

Walker's appeal presents a narrow question regarding proper interpretation of Section 2244's statute of limitations and tolling provisions. At issue is whether the AEDPA's mandate to toll its one-year limitations period during the pendency of "other collateral review" applies to properly filed federal habeas petitions or only to applications for state review. *See* 28 U.S.C. § 2244(d)(2).

In general, the AEDPA restricts the ability of prisoners to seek federal review of their state criminal convictions. Section 2244(d) created a new one-year statute of limitations in which state prisoners could file applications for a writ of habeas corpus. *See* 28 U.S.C. § 2244(d)(1). The one-year period generally runs from the date on which the state criminal judgment became final. *See id.* Prisoners like

Walker, whose convictions became final prior to the AEDPA's effective date of April 24, 1996, have a one-year grace period in which to file their habeas corpus petitions, or until April 24, 1997. *See Ross v. Artuz,* 150 F.3d 97, 102-03 (2d Cir.1998). Section 2244 also has a tolling provision that applies to both the statute of limitations and the one-year grace period. *See Bennett v. Artuz,* 199 F.3d 116, 119 (2d Cir.1999) (holding that the "AEDPA's pending-state-petition tolling provision does apply to a petition challenging a pre-AEDPA conviction"), *petition for cert. filed,* __ U.S.L.W. __ (U.S. Jan. 24, 2000) (No. 99-1238). The tolling provision at Section 2244(d)(2) states:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2).

Walker interprets Section 2244(d)(2), specifically the phrase "other collateral review," to mean that we should exclude from the one-year grace period the time during which his first, timely habeas corpus petition was pending in federal court. That exclusion of approximately 80 days would render his second habeas petition timely. Respondent interprets the phrase "other collateral review" to mean only state procedures or remedies. Under this view, no tolling takes place and Walker's second habeas petition is untimely because he filed it after the one-year grace period ended on April 24, 1997. Both Walker and respondent claim that their

interpretations rely on the plain language of Section 2244(d)(2) and are consistent with the legislative goals of the AEDPA.

Although a number of federal district courts have addressed this question, only one other circuit court of appeals has decided the issue. In *Jones v. Morton*, the Third Circuit held that Congress "intended that the word 'State' would be read to modify both 'post-conviction' and 'other collateral,' so that tolling would be afforded under § 2244(d)(2) for various forms of state review only." *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir.1999). The Third Circuit relied upon a California federal district court case, *Sperling v. White*, 30 F.Supp.2d 1246, 1250 (C.D.Cal.1998), as well as other district court cases adopting *Sperling*'s interpretation. *See Jones*, 195 F.3d at 158-59. In *Sperling*, the district court adopted the report and recommendation of a magistrate judge holding that Section 2244(d)(2) "does not contemplate tolling limitations during the time a habeas petition is pending in federal court." *Sperling*, 30 F.Supp.2d at 1250. *But see Barrett v. Yearwood*, 63 F.Supp.2d 1245, 1249-50 (E.D.Cal.1999) (reaching opposite result). We respectfully disagree with the *Jones* approach.

It is possible to interpret the word "State" in Section 2244(d)(2) to modify both "post-conviction" and "other collateral." Close analysis of the statute language, however, shows that "State" modifies only the word "post-conviction," and the phrase "other collateral" is to be given its naturally broader meaning. The disjunctive "or" in the statute creates a distinct break between the two kinds of review *Jones* and *Sperling* would tie together. In contrast, applying "State" to

both of the disjunctive phrases would create a linguistic oddity because the statute would refer to "a properly filed application" for "State post-conviction . . . review" or "State . . . other review." "State other *collateral* review" is an ungainly construction that we do not believe Congress intended. If Congress had intended the meaning that the *Sperling* court imputed, it might more naturally have written "a properly filed application for State post-conviction or collateral review." We choose to adopt an interpretation that gives full meaning to the phrase "State post-conviction review," which includes all state remedies, and the phrase "other collateral review," which means federal habeas petitions. As the district court held in *Barrett,* " 'State post-conviction review' means all collateral review of a conviction provided by a state," and the phrase "other collateral review" would be meaningless if it did not refer to federal habeas petitions. *Barrett,* 63 F.Supp.2d at 1250.

In addition, the district court's interpretation in *Sperling* strains to hold that "State post-conviction review" means state judicial remedies and "other collateral review" means non-judicial state remedies such as petitions for clemency filed with the governor. *See Sperling,* 30 F.Supp.2d at 1251. This reading would require us to interpret at least one of these terms differently from its normal usage, because both "collateral review" and "post-conviction review" conventionally refer to habeas corpus, *coram nobis* and similar writs or judicial orders that courts issue after a conviction is final, overturning the conviction by reason of some error of law. *Sperling* read "collateral" to apply to clemency and pardon applications in order to avoid having it refer to the same scope of proceedings as "post-conviction

review" describes, but we can see no logical reason why Congress would have thought those applications to be included in the term "collateral" but not "post-conviction." The only legislative history upon which the *Sperling* decision relies for its equation of "other collateral review" with petitions for clemency is a statement of Senator Orrin Hatch concerning a totally different proposed amendment to the legislation and discussed in the context of capital cases. *See id.* at 1251 (citing 141 Cong. Rec. S7803-01, S7825-26 (June 7, 1995) as "appearing to describe a state petition for clemency as a form of collateral review, but distinct from judicial post-conviction review"). The *Sperling* court's own characterization of the legislative history provides only a slender reed upon which to rest its holding. Because "post-conviction review" is a broad term that seems to encompass all review a prisoner seeks after conviction, we can see no reason why Congress should have believed that there were "other" forms of "collateral review" that did not come within the scope of "post-conviction review."

The *Sperling* court also held that its interpretation was consistent with the overall objective of the AEDPA "to place finite restrictions upon the time within which a petitioner may file a petition in federal court." *Id.* at 1251. However, allowing Walker to exclude the time during which his first federal habeas petition was pending does not create a loophole in the law. The tolling provision by its terms already pertains only to "properly filed application[s]." 28 U.S.C. § 2244(d)(2). Thus, for example, successive petitions arguably would not toll the one-year period. Even if they did, the act's restrictions on successive petitions, *see* 28 U.S.C. § 2244(b), would not allow a petitioner to file

another petition if the district court dismissed a first petition on its merits or with prejudice. We therefore disagree with respondent that our reading would frustrate the AEDPA's purpose by allowing petitioners to indefinitely toll the statute of limitations by filing a series of unexhausted petitions.

Moreover, including federal petitions within the meaning of Section 2244(d)(2) will reward petitioners for filing their federal petitions as soon as possible, thus promoting the statutory objective of efficiency in the review of state criminal judgments. Congress enacted the limitations period to spur defendants to file their federal habeas petitions more quickly, and reading the tolling provision to encompass federal court consideration of the petitions furthers this goal. Under our reading of the statute, defendants will have an incentive to file their federal petitions right away because this filing will toll the one-year statute of limitations. This tolling is particularly useful for a petitioner if, upon review, the federal court determines that he must return to state court to exhaust his claims. Meanwhile, if the claims are properly before the federal court, this incentive leads to speedier completion of collateral review.

We must examine the issue before us in the historical context of the AEDPA. This statute created a one-year statute of limitations where none previously existed. *See Ross,* 150 F.3d at 98. This in itself was a dramatic change in the law and was Congress' primary vehicle for streamlining the habeas review process and lending finality to state convictions. By reading the tolling provision of Section 2244 to include pending federal habeas petitions, we do not detract from the overall purpose of the AEDPA because the statute

of limitations remains enforceable and intact. Our interpretation merely avoids penalizing state prisoners who properly have filed federal habeas petitions and are awaiting a response from the court.

In adopting the contrary position, the Third Circuit did not "dwell" on the issue before it because it believed the majority of courts considering the issue adopted the *Sperling v. White* approach. *See Jones,* 195 F.3d at 158-59. We do not see a consensus emerging. It is true that three other California district court cases are consistent with the *Sperling* decision issued in the Central District of California. *See Harrison v. Galaza,* No. C 98-3371 TEH (PR), 1999 WL 58594, at *2 (N.D.Cal. Feb. 4, 1999); *Vincze v. Hickman,* No. CIV.S-98-044 WBSGGHP, 1999 WL 68330, at *1 (E.D.Cal. Jan. 13, 1999); *Babcock v. Duncan,* No. C 97-2740 VRW (PR), 1997 WL 724450, at *2 (N.D.Cal. Nov. 12, 1997). As noted above, however, we find the analysis of the California minority position in *Barrett* to be more persuasive. *See Barrett,* 63 F.Supp.2d at 1249-50. In addition, one of the district court cases upon which both *Jones* and *Sperling* rely does not clearly support their position. In the Wisconsin case of *Kethley v. Berge,* the district court indeed held that "time is not tolled while an improperly filed *federal* habeas petition is gathering dust on district court shelves" pursuant to Section 2244(d)(2). *See Kethley v. Berge,* 14 F.Supp.2d 1077, 1079 (E.D.Wis.1998). However, the Wisconsin court also recognized the inequity resulting from its interpretation, stating that "the procedural dismissal of petitioner's action in the present case should not later be construed to produce the unintended effect of barring federal habeas review under the AEDPA statute of limitations provision." *Id.* The *Kethley*

court remedied this problem by permitting the petitioner to reopen his petition after exhausting state remedies and preserve his original case number and filing date as "a form of equitable tolling of the AEDPA's limitations period." *Id.* at 1079. Cases purporting to follow *Kethley's* interpretation of Section 2244(d)(2) have not adopted this second part of the solution. Although we agree with the Wisconsin court's assessment of the inequity its interpretation of Section 2244(d)(2) creates, we find its solution to the problem — preserving the original petition's case number and filing date — to be artificial and cumbersome. A much simpler approach is to interpret the words of Section 2244(d)(2) to allow tolling outright in cases such as Walker's.

Because we decide that Section 2244(d)(2) by its terms tolled the one-year period of limitations while Walker's first federal habeas petition was pending, we need not reach his alternative argument that the court should exercise its equitable powers to exclude the approximately 80 days during which the first petition was pending.

CONCLUSION

For the foregoing reasons, we reverse the district court's dismissal, reinstate Walker's petition for *habeas corpus* relief, and remand the matter to the district court for further proceedings.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED MAY 6, 1998 AND FILED MAY 13, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

97 CV 3397 (SJ)

SHERMAN WALKER,

Petitioner,

– against –

CHRISTOPHER ARTUZ, Superintendent of Green Haven Correctional Facility,

Respondent.

MEMORANDUM AND ORDER

* * *

JOHNSON, District Judge:

Sherman Walker ("Petitioner" or "Walker") has petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner believes his state court conviction should be reversed because (1) the prosecution failed to provide *Rosario* materials and (2) Petitioner was denied his constitutional right to counsel at the lineup when police deliberately failed to contact his counsel. Respondent

moves to dismiss the petition as time-barred. For the reasons stated below, the petition is dismissed.

BACKGROUND

On June 16, 1992, after pleading guilty, Petitioner was convicted of Robbery in the First Degree (N.Y. Penal Law § 120.10[1]) and sentenced to a prison term of 7 to 14 years. Petitioner appealed his conviction to the New York Supreme Court, Appellate Division, Second Department ("Appellate Division"). On June 12, 1995, the Appellate Division affirmed Petitioner's judgment of conviction. *People v. Walker*, 216 A.D.2d 425 (2d Dept. 1995). On January 5, 1996, the New York State Court of Appeals denied Petitioner further leave to appeal. *People v. Walker*, 87 N.Y. 926 (1996).

Petitioner filed his first habeas corpus petition in June of 1996 in conjunction with a claim pursuant to 42 U.S.C. § 1983. On July 9, 1996, this Court dismissed the petition without prejudice pursuant to 28 U.S.C. § 1915(d) because it was not apparent that Walker had exhausted all of his state remedies. *Walker v. Legal Aid et al.*, 96 CV 2946 (E.D.N.Y. June 9, 1996). On May 20, 1997, Petitioner filed the instant petition.

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1. Rule 4 of the Rules Governing Section 2254 Cases for the United States District Courts permits a court to order summary dismissal of a habeas corpus petition if the petitioner is not entitled to relief in the district court.

Appendix B

DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[2] which became effective on April 24, 1996, significantly amended 28 U.S.C. §§ 2244, 2253, 2254 and 2255. As a result, 28 U.S.C. § 2244(d)(1) now provides that federal habeas petitions challenging a judgment of a state court are subject to a one-year statute of limitations.[3] The

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2. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

3. 28 U.S.C. § 2244(d)(1) states:

> (1) a 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly

(Cont'd)

limitation period, with certain exceptions, begins to run either after the completion of direct review of the judgment by the state courts or upon the expiration of the time for seeking such review. *See* 28 U.S.C. § 2244(d)(1). However, Congress did not provide specific guidelines regarding the retroactivity of this provision, thereby leaving the resolution of that issue to the courts. The Court of Appeals of the Second Circuit has held that in cases where, as here, the judgment of conviction became final before the effective date of the AEDPA, the habeas petition may be filed outside the one-year period but within a "reasonable time" after April 24, 1996. *See Peterson v. Demskie*, 107 F.3d 92, 93 (2d Cir. 1997). Yet, it declined to set forth a precise definition of "reasonable time."

In *Peterson*, the court held that the petitioner's filing of his petition seventy-two days after the effective date of the AEDPA was timely. *Id.* at 93. However, the court stated that "where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition," it saw no need to accord a full year after the effective date of the AEDPA. *Id.* at 93. Further, the court cautioned that the reasonable time alternative should not be applied with undue rigor. *Id.*

(Cont'd)

> recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Appendix B

In order to analyze the effect of the AEDPA on the instant case, it is necessary to reiterate the dates of the relevant events. As set forth above, Petitioner's state court conviction became final on January 15, 1996, when Petitioner failed to file an appeal ten days after the New York Court of Appeals decision. Petitioner did not file any collateral motions. Walker's second habeas petition is dated May 20, 1997[4] — over one year and four months after the completion of his direct appeal, over one year after the effective date of the AEDPA, and almost one full year after his first habeas petition was dismissed. Even after being notified that his first habeas petition failed to state a claim, Walker waited almost one year to file his second habeas petition. Thus, the Court finds that Walker's current petition was not filed within a reasonable time as contemplated in *Peterson*. Accordingly, the Court hereby dismisses the petition as time-barred. *See Clark v. Greiner*, 97 CV 2483 (E.D.N.Y. July 10, 1997) (habeas petition dismissed as untimely where it was filed over one and one-half years after conviction became final and eleven months and two and one-half weeks after enactment of the AEDPA); *Smith v. Stinson*, 97 CV 1935 (E.D.N.Y. June 30, 1997) (finding untimely a petition filed more than two years after conviction became final and eleven months and three weeks after enactment of the AEDPA); *Calderon v. Artuz*, 97 CV 1965 (E.D.N.Y. June 25, 1997) (dismissing petition filed eleven months and three weeks after the effective date of the AEDPA and over four and one-half years after the state court judgment as untimely); *DeChirico v. Walker*, 97 CV 1456 (E.D.N.Y. June 12, 1997)

4. Where a prisoner is proceeding *pro se*, he is deemed to have filed his application when it is delivered to prison officials. *Houston v. Lack*, 487 U.S. 266, 273 (1988).

(finding petition filed almost eleven months after the effective date of the AEDPA, and over four years after his judgment of conviction became final was untimely); *Oppenheimer v. Kelly*, 1997 WL 362216 (S.D.N.Y. 1997) (stating that filing 350 days after the effective date of the AEDPA is unreasonable); *Zebrowski v. Keane*, 1997 WL 436820 (N.D.N.Y. 1997) (concluding that petition filed more than three years after judgment of conviction became final and more than one year after the effective date of the AEDPA was not timely); *Berger v. Stinson*, 1997 WL 535227 (W.D.N.Y. 1997) (dismissing petition filed eight days short of a full year after the AEDPA became effective and where the underlying conviction occurred more than a decade ago as time-barred). *But see Rivalta v. Artuz*, 1997 WL 401819 (S.D.N.Y. 1997) (finding a petition filed six months after the effective date of the AEDPA was timely).

Given that the petition is time-barred, the merits of Petitioner's claims shall not be addressed. In addition, this Court declines to issue a certificate of appealability, as Petitioner has not presented a "substantial showing of the denial of a constitutional right." *See Nelson v. Walker*, 121 F.3d 828, 832 n.3 (2d Cir. 1997).

CONCLUSION

For the reasons set forth above, Walker's petition for a writ of habeas corpus is dismissed.

SO ORDERED.

Dated: May 6, 1998
Brooklyn, New York

s/ Sterling Johnson
U.S.D.J.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JULY 9, 1996

Sherman WALKER,

Plaintiff,

v.

The LEGAL AID SOCIETY, Philip Weinstein, Joel Atlas, James Branden, Hillar Wiese, Alden Lewis, Samuel Feldman, and Christopher Artuz, Superintendent of the Green Haven Correctional Facility,

Defendants.

No. 96 CV 2946.

United States District Court,
E.D. New York.

July 09, 1996.

* * *

MEMORANDUM AND ORDER

JOHNSON, District Judge:

Sherman Walker ("plaintiff" or "Walker"), appearing pro se, brings this action pursuant to 42 U.S.C. § 1983 alleging that a number of lawyers associated with the Legal Aid

Society and in private practice violated his right to counsel and due process of the law. Plaintiff also seeks habeas corpus relief pursuant to 28 U.S.C. § 2254. For the reasons stated below, the motion to proceed in forma pauperis is granted, but the complaint is dismissed sua sponte in accordance with 28 U.S.C. § 1915(d).

BACKGROUND

In three separate state court trials — one in New York County, and two in Queens County — Plaintiff was convicted on robbery charges. In each case, the Legal Aid Society was appointed to represent plaintiff in the appeal of his conviction. In the course of representing Walker, however, it became apparent that the Legal Aid Society already represented a confidential informant who had been a primary source of information leading to plaintiff's arrest. Because representing both clients would pose a conflict of interest, the Legal Aid Society formally moved to be relieved as counsel on plaintiff's appeals. The state appellate courts granted this motion and appointed new counsel to prosecute plaintiff's appeals.

Walker now argues that no confidential informant existed and thus that there was no conflict of interest preventing the Legal Aid Society from representing him. Plaintiff contends that, although he notified the Legal Aid Society of this fact, they failed to investigate his claim. Plaintiff argues that the Legal Aid Society's improper withdrawal denied him of his right to the counsel of his choice and due process of the law.

Appendix C

Accompanying plaintiff's complaint was an application to proceed in forma pauperis.

DISCUSSION

Under 28 U.S.C. § 1915, a district court may dismiss a case in which the plaintiff has applied to proceed in forma pauperis "if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d). The Second Circuit follows a two-step approach in establishing eligibility to proceed in forma pauperis by first assessing a plaintiff's financial status, followed by a determination as to the frivolousness of the action. See Anderson v. Coughlin, 700 F.2d 37, 41 (2d Cir.1983).

Applying the two-step approach to the present case, this Court finds that plaintiff satisfies the financial requirements to proceed in forma pauperis. Based on the allegation of poverty stated in his declaration, the Court is convinced that Walker is unable to pay the costs and filing fees in connection with this suit. Thus, plaintiff's motion for leave to proceed in forma pauperis is granted.

Nevertheless, plaintiff's complaint must be dismissed. First, to establish a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate that the conduct complained of was committed by a person acting under the color of state law and that the conduct deprived the plaintiff of a federal right. Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir.1996). The United States Supreme Court has stated unequivocally that court-appointed lawyers do not act under color of state law within the meaning of § 1983. See Polk County v. Dodson,

454 U.S. 312 (1981) (public defender does not act under color of state law); Cassidento v. Hammer, 1995 WL 722536 (2d Cir.1995) (court-appointed attorney does not act under color of state law). As such, plaintiff's claims against all of the individual attorneys as well as the Legal Aid Society must be dismissed. See Pino v. Ryan, 49 F.3d 51 (2d Cir.1995) (sua sponte dismissal may be based on an affirmative defense that appears on the face of the complaint).

Plaintiff's claim for habeas corpus relief also must be dismissed for failure to adequately set forth his claim. For instance, although plaintiff refers to state appellate proceedings relating to his robbery convictions, he fails to specify the claims litigated in those appeals. Because this court cannot determine which issues have been properly exhausted in state court, the essential allegations of a habeas corpus action have not been presented. See 28 U.S.C. § 2254(b) (writ of habeas corpus "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State"). Therefore, this claim is dismissed without prejudice.

CONCLUSION

For the reasons stated herein, plaintiff's motion to proceed in forma pauperis is granted. However, the Court finds plaintiff's complaint to be frivolous within the meaning of 28 U.S.C. § 1915(d), since it fails to state a cognizable claim under 42 U.S.C. § 1983 or 28 U.S.C. § 2254. Accordingly, plaintiff's complaint is dismissed without prejudice.

SO ORDERED.

ORIGINAL

Supreme Court, U.S.
FILED
OCT 13 2000
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

----------X

GEORGE DUNCAN,

Petitioner,

-against-

SHERMAN WALKER,

Respondent.

----------X

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

No. 00-121

The respondent asks leave to file the attached opposition brief to a petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis* in the following court:

United States Court of Appeals for the Second Circuit.

Counsel was appointed by the United States District Court under the Criminal Justice Act of 1964, 18 U.S.C. §3006A.

Deborah Wolkow Loewenberg
Attorney for the Respondent
SHERMAN WALKER
155 North Main Street
New City, NY 10956

Dated: New City, New York
October 11, 2000

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 00-121

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE DUNCAN, Petitioner,

v.

SHERMAN WALKER, Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the court below correctly ruled that a prior federal habeas corpus petition is an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2), which provides that the one-year statute of limitations for federal habeas corpus petitions set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is tolled during the pendency of such an application?

(The question of whether the prior federal habeas corpus petition was "properly filed" is not properly presented for review in this case. This question was neither raised nor opposed by either party in their respective briefs filed with the Second Circuit Court of Appeals and it was not reached by the court below.)

OPINIONS BELOW

The opinions of the district court and the Second Circuit Court of Appeals are attached to the petition as Appendix A, Appendix B and Appendix C.

STATEMENT OF JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Order of the Second Circuit Court of Appeals was entered on March 27, 2000. The 90-day period for filing a petition for certiorari was extended to July 25, 2000 by Order of Justice Ginsburg, dated June 19, 2000.

STATEMENT OF THE CASE

Respondent's state conviction, which pre-dates the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), became final on April 14, 1996. On April 10, 1996, Respondent, *pro se*, filed a single document with the district court for the Eastern District of New York that included a claim under 48 U.S.C.§ 1983 and a habeas corpus petition pursuant to U.S.C. § 2254. The district court dismissed the petition without prejudice because it was unclear whether Respondent had exhausted all available states avenues of redress. Walker v. The Legal Aid Society, et al. (Appendix C attached to the Petition).

On May 22, 1997, Respondent, *pro se*, filed his second petition for a writ of habeas corpus. Applying the law of Peterson v. Demskie, 107 F.3d 92 (2d Cir. 1997), the district court dismissed the petition because it was not filed within a "reasonable time"

after the enactment of AEDPA, April 24, 1996. Walker v. Artuz, (Appendix B attached to the Petition).

The Second Circuit Court of Appeals granted Respondent's application for a Certificate of Appealability by Order entered December 1, 1998. The following questions were certified for review:

> 1. Whether the petitioner-appellant's first petition for writ of habeas corpus pursuant to 28 U.S.C.§2254 tolled the period of limitations set forth in 28 U.S.C.§2244(d)(2).
>
> 2. Whether the limitations set forth in 28 U.S.C.§2244(d) may be equitably tolled where the prior, timely-filed section 2254 petition was dismissed without prejudice for failure to exhaust all claims and the petitioner-appellant did not file a new petition stating only exhausted claims until after the one-year grace period noted in *Ross v. Artuz*, 150 F.3d 97 (2d Cir. 1998).

By Opinion dated March 27, 2000, the Second Circuit Court of Appeals reversed the district court and held that Respondent's second federal habeas petition was improperly dismissed as untimely. The Court ruled that the statute of limitations set forth in 28 U.S.C.§ 2244 (d)(1) was tolled with Respondent's filing of his first petition for federal habeas corpus relief because the tolling provisions set forth in 28 U.S.C. § 2244 (d)(2) include pending federal habeas petitions. Specifically, the Court held that the plain meaning of the statute compels a finding that a federal habeas petition is "collateral review". "Close analysis of the statute language, however, shows that 'State' modifies only the word 'post-conviction,' and the phrase 'other collateral' is to be given its naturally broader meaning." Walker v. Artuz, 208 F.3d 357 (2d Cir. 2000), (Appendix A attached to the Petition). The Court further held that its ruling was consistent with the overall objective of AEDPA "because the statute of limitations remains enforceable and

intact. Our interpretation merely avoids penalizing state prisoners who properly have filed federal habeas petitions and are awaiting a response from the court." Id.

REASONS FOR DENYING THE WRIT

1. Respondent respectfully submits that there are no compelling or important reasons for granting certiorari in this case. Even though the Second Circuit Court of Appeal's decision is in conflict with the Third Circuit Court of Appeals, the fact remains that the statutory prohibitions in place barring the filing of successive petitions for habeas relief address Petitioner's fear that the Second Circuit Court of Appeal's ruling will permit state petitioners to circumvent and frustrate the objectives of AEDPA.
2. The Second Circuit Court of Appeals correctly reversed the district court's Order and reinstated Respondent's petition for habeas relief.

ARGUMENT

Although there is a conflict between two circuit courts which have considered whether pending federal habeas petitions are applications for "other collateral review" within the meaning of 28 U.S.C. §2244(d)(2), the matter is not "important". (Supreme Court Rule 10). Surely, not every conflict between or among circuit courts must give rise to the issuance of a writ of certiorari. For example, certiorari was denied in Kamberos v. GTE Automatic Electric, Inc., 454 U.S. 1060 (1981) despite a direct conflict between the Fifth and Seventh Circuits in their respective interpretation of a petitioner's

responsibilities to seek a right-to-sue letter from the EEOC under the Civil Rights Act of 1964. Similarly, certiorari was denied in Greco v. Orange Memorial Hospital Corp., 423 U.S. 1000(1975) even though the Fifth Circuit was in conflict with the First, Fourth, Sixth and Eighth Circuits Court of Appeals.

In the case at bar, the Second Circuit's ruling squarely conflicts with the determination of the Third Circuit Court of Appeals in Jones v. Morton, 195 F.3d 153 (3d Cir. 1999), which determined that petitioner's federal habeas application was not an application for "other collateral review" under the meaning of AEDPA. The facts presented in Rhine v. Boone, 182 F.3d 1153 (10th Cir. 1999), however, presented a different question: does "other collateral review" encompass the pendency of an application for certiorari to this Court?

The statute at the heart of the conflict between the Second and Third Circuits is 28 U.S.C. § 2244 (d) (2), which has been in effect for more than four (4) years. However, despite the great many state prisoners who seek federal habeas relief throughout the country, the question has only reached the Circuit Courts in two of the twelve circuits since the statute's enactment. It may be said the conflict or issue is not of the magnitude warranting this Court's review, i.e., it lacks sufficient importance. Perhaps, if other circuit courts have the occasion to determine whether the statute is tolled during the pendency of a federal habeas petition, the conflict will resolve itself by one of the two circuits reconsidering its ruling.

Any fear that the Second Circuit's ruling will permit state prisoners to circumvent the objectives of AEDPA -- encouraging finality of state convictions and the timely filing of federal petitions—is dispelled by (1) the enactment of 28 U.S.C. §2244 (Finality of

determination), which prohibits the successive filing of habeas petitions, and requires the issuance of an order by the circuit court, authorizing the filing of the second or successive petition; and (2) by the tolling provisions in 28 U.S.C. §2244(d)(2), which "remain enforceable and intact." Walker v. Artuz, Id.

The Second Circuit Court of Appeals correctly ruled that the plain meaning of 28 U.S.C.§2244 (d)(2) supports the conclusion that federal habeas corpus petitions are included in "other collateral review." The phrase "State post-conviction review" is not limited to direct review. It also includes state collateral proceedings such as coram nobis petitions, state habeas petitions, and state post-conviction motions to vacate or dismiss judgments of conviction. The interpretation of the phrase "other collateral review" to mean "other State collateral review" urges a cumbersome and linguistically redundant reading of the statute. The only natural and logical reading of the statute is that federal applications, like petitions for federal habeas relief, are "other", i.e., non-state "collateral" applications.

The Second Circuit Court of Appeals looked to the "design of the statute as a whole and to its object and policy" in ruling that Respondent's time to file his federal petition was tolled by the filing of his first petition, which was dismissed without prejudice. United States v. American Trucking Association, 310 U.S. 534,542 (1940). Prior to the enactment of AEDPA, state prisoners had unrestricted time in which to seek federal habeas relief. AEDPA was enacted to encourage the swift and diligent pursuit of federal relief by state inmates, and to eliminate, what in some instances were years or decades of delay between state convictions and federal review. Valentine v. Senokowski, 966 F.Supp. 239, 241 (S.D.N.Y. 1997), citing H.R. Rep. No. 104-23 at 29. AEDPA was not

enacted to bar federal habeas review by petitioners like Respondent who filed a timely petition which was dismissed without prejudice. To be sure, the Second Circuit Court of Appeal's holding in this case is conformance with the reasoning and spirit of this Court in Stewart v. Martinez-Villareal, 523 U.S.637 (1998), when it ruled that petitioner's application was not a successive or second petition, when his first application had been dismissed as premature. This Court reasoned that "(t)o hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." Id. at 645. See, also, Slack v. McDaniel, ___U.S.___ (2000), 120 S.Ct. 1595.

As the Second Circuit Court of Appeals noted in Walker v. Artuz, Id., "Our interpretation merely avoids penalizing state prisoners who properly have filed federal habeas petitions and are awaiting a response from the court." The period of limitations was enacted to compel state inmates to swiftly bring their constitutional claims to federal court, not as a penalty for state inmates, like Respondent, who diligently seek post-conviction review and who properly file their federal habeas petitions.

CONCLUSION

Based upon these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DEBORAH WOLIKOW LOEWENBERG
Attorney for Respondent Sherman Walker

October 10, 2000

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class, United States Mail, postage prepaid to the following persons, on the 11th day of October, 2000. I further certify that all parties have been served:

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Sworn to before me this
11th day of October, 2000

Notary Public

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Notary Public, State of New York
No. 01SC4718134
Qualified in Rockland County
Commission Expires November 30, 2002

(2)

Supreme Court, U.S.
FILED
AUG 1 8 2000
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No. 00-121

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE DUNCAN, *Petitioner*,

v.

SHERMAN WALKER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, NEVADA, AND WEST VIRGINIA IN SUPPORT OF PETITIONER GEORGE DUNCAN

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QUESTIONS PRESENTED

1. Whether a prior federal habeas corpus petition is an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2), which provides that the one-year statute of limitations for federal habeas corpus petitions set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is tolled during the pendency of such an application.

2. Whether a prior federal habeas corpus petition, dismissed without prejudice for failure to indicate that the claims it asserts have been exhausted in state court, is "properly filed" under 28 U.S.C. § 2244(d)(2) and therefore tolls the one-year AEDPA statute of limitations during its pendency.

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* * *

IN THE SUPREME COURT OF THE UNITED STATES

No. 00-121

GEORGE DUNCAN, *Petitioner*,

v.

SHERMAN WALKER, *Respondent*.

INTEREST OF AMICI CURIAE

Amici curiae are the legal representatives of their states' executives and of the People in their states' post-conviction litigation. The states have a weighty interest in the finality and enforcement of their state criminal judgments. This interest embraces concerns about the timely pursuit of post-conviction remedies in federal court.

Amici have a significant interest in this particular case since the *Walker* opinion does substantial damage to one of the AEDPA's most important components, the statute of limitations. Under *Walker's* interpretation, petitioners are permitted to toll the limitations period almost indefinitely. This result defeats the very purpose of the statute of limitations to place finite restrictions on the time for filing federal habeas corpus petitions. Furthermore, the opinion ignores the states' valid interest in the timely resolution of their state criminal judgments.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be granted because it raises important questions of federal law that have not been, but should be, settled by this Court. U.S. Supreme Ct. R. 10(c). Furthermore, granting the petition is appropriate because one United States court of appeals has entered a decision in conflict with the decisions of three other United States courts of appeals on the same important matter. U.S. Supreme Ct. R. 10(a).

ARGUMENT

The petition for writ of certiorari should be granted because the determination of whether the AEDPA's limitations period is tolled during the pendency of a properly filed federal petition is an issue of substantial importance to the states, as well as petitioners. As the petition points out, approximately 20,000 habeas corpus proceedings are commenced each year in the federal courts and a significant number of these petitions are dismissed without prejudice for failing to exhaust state remedies. Pet. at 12. Many of these cases return to federal court after exhaustion has been completed, thus making the issue of the tolling effect of the initial unexhausted petition a recurring question. This Court's determination that dismissal of an unexhausted petition does not bar a subsequent petition as second or successive makes the issue all the more prevalent. *See Slack v. McDaniel*, ___ U.S. ___; 120 S. Ct. 1595, 146 L.Ed.2d 542 (2000). Granting the petition and resolving this issue will impact a large number of cases and will settle an important question of federal law.[1/]

---

1. Petitioner is also presenting a second question to the Court

Guidance from the Court is required because there is a division among the federal courts. In this case, the Second Circuit Court of Appeals concluded that the phrase "State post-conviction or other collateral review" contains a veiled reference to federal collateral review. The Third, Fifth, and Tenth Circuits have reached the opposite conclusion. *Grooms v. Johnson*, 208 F.3d 488 (5th Cir. 1999); *Jones v. Morton*, 195 F.3d 153 (3rd Cir. 1999); *Rhine v. Boone*, 182 F.3d 1153 (10th Cir. 1999). The decisions are squarely in conflict. In addition, published decisions of the federal district courts in California have reached opposite conclusions. *Compare Barrett v. Yearwood*, 63 F. Supp. 2d 1245, 1250 (E.D. Cal. 1999), with *Sperling v. White*, 30 F. Supp. 2d 1246, 1250 (C.D. Cal. 1998). Uniform application of the statute of limitations cannot be reached until the Court addresses the issue.

---

concerning whether a prior federal habeas corpus petition, dismissed without prejudice for failure to indicate that the claims it asserts have been exhausted in state court, is "properly filed" under 28 U.S.C. § 2244(d)(2) and therefore tolls the one-year AEDPA statute of limitations during its pendency. Although this brief concentrates only on the first question presented, amici curiae believe this Court should grant the petition as to both questions.

CONCLUSION

For the reasons stated, as well as those set forth in the petition for writ of certiorari, amici curiae request that the petition be granted.

Dated: August 18, 2000.

Respectfully submitted,

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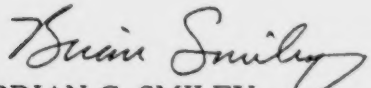

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FILED
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No. 00-121

IN THE

Supreme Court of the United States

GEORGE DUNCAN,

Petitioner,

v.

SHERMAN WALKER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 21, 2000
CERTIORARI GRANTED NOVEMBER 13, 2000

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RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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GENERAL DOCKET FOR
Second Circuit Court of Appeals

Court of Appeals Docket #: 98-2572 Filed: 6/24/98
Nsuit: 3530 PRISONER PET-Habeas Corpus
Walker v. Artuz
Appeal from: U.S. District Court EDNY

Case type information:
1) Prisoner Petition
2) State
3) Habeas Corpus

Lower court information:

District: 0207-01: 97-cv-3397
Trial Judge: Sterling Johnson, Jr.
Magistrate Judge: Aaron Simon Chrein
Date Filed: 6/10/97
Date order/judgment: 5/18/98
Date NOA filed: 6/19/98

Fee status: ifp granted

Relevant Docket Entries — Court of Appeals

Prior cases:
None
Current cases:
None

Panel Assignment:
Panel: JMW PNL RSP 1705 :CA2 9/15/99 am
Date of decision: 3/27/00

Proceedings include all events.
98-2572 Walker v. Artuz

SHERMAN WALKER
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Relevant Docket Entries — Court of Appeals

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Official Caption[1]

Docket No. [s]: 98-2572

SHERMAN WALKER,

Petitioner – Appellant,

v.

CHRISTOPHER ARTUZ, Superintendent,

Respondent – Appellee.

Authorized Abbreviated Caption[2]

Docket No. [s]: 98-2572

Walker v. Artuz

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1. Fed. R. App. P. Rule 12[a] and 32[a].

2. For use on correspondence and motions only.

Relevant Docket Entries — Court of Appeals

6/24/98	Copy of notice of appeal and district court docket entries on behalf of Appellant Sherman Walker, filed. (COADN; state – hc; fee ifp). [98-2572] (1135)
6/24/98	Note: This appeal was PRO SE when filed. (1135)
6/24/98	Copy of district court memorandum and order dismissing the petition for failure to present a substantial showing of the denial of a constitutional right, dated May 6, 1998, endorsed by Hon. Sterling Johnson, Jr., U.S.D.J., filed. (1135)
6/24/98	Copy of district court Judgment dismissing the petition as time barred, endorsed by Hon. Robert C. Heinemann, Clerk of Court, filed. (1135)
6/24/98	Record on appeal filed. (Original papers of district court.) Number of volumes: 1 (1135)
6/24/98	Notice of appeal CONSTRUED as a motion for certificate of appealability on behalf of Appellant Sherman Walker, filed. [1210872-1] (1135)
7/1/98	Letter requesting State Court proceedings and transcripts sent to BKNY/EDNY appeals clerk. State Court proceedings due on 7/13/98. (1135)
7/13/98	Notice of appeal acknowledgment letter from Efrem Z. Fisher for Appellee Christopher Artuz received. (in04)

Relevant Docket Entries — Court of Appeals

7/23/98	Letter received, dated 7/16/98 from Mary Ann McGee, Appeal's Clerk, E.D.N.Y, advising case manager to contact the Assistant District Attorney's office for State Court Record on time-barred cases. (1135)
7/23/98	Letter received from Appellant Marc Pelta requesting an extension of time to submit acknowledgment letter. (pr28)
8/4/98	Notice of appeal acknowledgment letter from Sherman Walker for Appellant Sherman Walker received. (pr20)
8/4/98	Notice of appearance form on behalf of Sherman Walker, received. (Orig. to Calendar) (pr20)
8/13/98	Letter received from Marion R. Buchbinder, Assistant Attorney General dated 8/11/98 re: change of counsel for respondent. (pr28)
8/25/98	Letter requesting State Court proceedings and transcripts sent to Dennis C. Vacco for Appellee Christopher Artuz. State Court proceedings due on 9/4/98. (1135)
9/1/98	State Court Proceedings lodged. (Please return to: Efrem Z. Fischer at Attorney General Office, 120 Broadway, New York, N.Y. 10271-0332). St.Ct proceedings deadline satisfied. (pr28)
12/18/98	Order FILED GRANTING motion for certificate of appealability [1210872-1] by Appellant

Sherman Walker, endorsed on motion form dated 6/24/98. "A motion having been made herein by petitioner-appellant pro se for a certificate of appealability, upon consideration thereof, it is ordered that said motion be and it hereby is granted. The parties are ordered to brief the following issues: (1) whether the petitioner-appellant's first petition for writ of habeas corpus pursuant to 28 U.S.C. sec. 2254 tolled the period of limitations set forth in 28 U.S.C. sec. 2244(d)(2), and (2) whether the limitations period in Section 2244(d) may be equitably tolled where the prior, timely-filed section 2254 petition was dismissed without prejudice for failure to exhaust all claims and the petitioner-appellant did not file a new petition stating only exhausted claims until after the one-year grace period noted in Ross v. Artuz, 150 F.3d 97 (2d cir. 1998) It is further ordered that counsel be appointed to represent the petitioner-appellant. (JLO, DJ, RSP, C.J.) (endorsed by LC) (pr28)

12/18/98 Certified copy of the order, dated 12/18/98 issued to the district court. (pr28)

12/21/98 Notice to all parties of Order dated 12/18/98. (pr28)

1/4/99 Certified copy of Mandate dated 12/18/98 receipt returned from the district court. (pr28)

Relevant Docket Entries — Court of Appeals

1/5/99	Order appointing Deborah W. Loewenberg, Esq. for pro se appellant pursuant to CJA filed. Voucher#: 0668739 [Copies mailed to counsel and AO] (pr28)
1/5/99	CJA voucher issued to counsel: Deborah W. Loewenberg, Esq. for Sherman Walker (Voucher #: 0668739) [98-2572] (pr28)
1/5/99	Scheduling order no. 1 filed, continuing/appointing counsel: Deborah W. Loewenberg, Esq. pursuant to CJA. Appellant/Pet brief jt appendix due on 3/8/99. Appellee/Respondent brief due on 4/7/99. Response to Anders brief due on 3/22/99. Argument as early as week of 5/24/99. (pr28)
1/5/99	Notice to all parties of scheduling order #1 issued on 1/5/99. (pr28)
3/3/99	Letter received from Deborah Wolikow Loeweneberg, dated 3/2/99 re: enclosed an original motion for an enlargement of time to perfect Appellant's appeal with four copies of the moving papers and an original affidavit of service. (pr28)
3/3/99	Appellant Sherman Walker motion to extend time to Enlargment of time to serve and file brief by April 8, 1999, FILED (w/pfs). [1352688-1] (pr28)

Relevant Docket Entries — Court of Appeals

3/8/99	Order FILED GRANTING motion for extended time [1352688-1] by Appellant Sherman Walker, endorsed on motion form dated 3/3/99. Extended appellant's brief due date is 3/19/99. Extended appellee's brief due date is 4/19/99. Extended argument week as early as 6/1/99. (LG) (am)
3/8/99	Notice to counsel: Order filed 3/8/99. (am)
3/9/99	Pro se letter sent to attorney Deborah Lowenberg. (pr28)
3/19/99	Appellant Sherman Walker brief FILED with proof of service. (shelf 28) Cancel response to Anders brief (pr28)
3/19/99	Appellant Sherman Walker joint appendix filed w/pfs. Number of volumes: 10. (pr28)
4/14/99	Appellee Christopher Artuz motion to extend time to file Appellee's brief until the week of June 1 or later, FILED (w/pfs). [1379287-1] (pr28)
4/20/99	Order FILED GRANTING motion for extended time [1379287-1] by Appellee Christopher Artuz, endorsed on motion form dated 4/14/99. Extended appellee's brief due date is 5/17/99. Extended argument week as early as 6/28/99. (LG) (pr28)
4/20/99	Notice to all parties of Order dated 4/20/99. (pr28)

Relevant Docket Entries — Court of Appeals

5/3/99	Letter received from Deborah Wolikow Loewenberg, dated 4/30/98 re: Rule 46(e) letter (pr28)
5/17/99	Appellee Christopher Artuz brief filed with proof of service. (shelf 28) (pr28)
7/26/99	A PANEL/ Proposed for argument the week of 9/13/99. (ca90)
8/4/99	Set for argument on 9/15/99 A PANEL. [98-2572] (ca93)
8/18/99	Letter received from Mary Lynn Nicolas, Assistant Attorney General, dated 8/17/99 re: informing the court that his office has reassigned the undersigned counsel for appellee in the above-entitled action. (pr28)
9/15/99	Case heard before Walker, Leval, Pooler, C.JJ. (TAPE: #26) (unj)
12/27/99	Papers <Certified/Paid Appeals Court CJA Voucher> from received. (pr28)
3/27/00	Judgment of the district court is REVERSED & REMANDED by published signed opinion filed. (RSP) [98-2572] (pr28)
3/27/00	Judgment filed. [Entry Date: 3/28/00] (pr28)
3/27/00	Notice to all parties of Opinion dated 3/27/00. (pr28)

Relevant Docket Entries — Court of Appeals

3/31/00	State Court proceedings returned to Attorney General's Office, 120 Broadway. (pr25)
4/4/00	Note: The OPINION PRICE is $ 2.00 (rek)
4/13/00	Errata sheet re: filed. (Page-1996, Line-18, Insert-. . . other collateral review (Emphasis for editing purpose only) (pr28)
4/17/00	Judgment MANDATE ISSUED. (pr28)
4/17/00	Notice to parties of Mandate issued on 4/17/00. (pr28)
5/23/00	Letter received from Florence A. Lott, dated 3/19/00 re: request for cost of attorney fees. (pr28)
5/31/00	Pro se letter from appellant's mother Florence A. Lott sent to attorney. (pr28)
6/7/00	Letter received from Deborah Loewenberg, dated 6/7/00 to Mr. Lott informing him that she received a letter from his mother dated 5/19/00. (pr28)
6/21/00	Letter received from Clayton R. Higgins, Jr., Assistant Clerk, dated 6/16/00 re: informing the court the application for an extension of time within which to file a petition for a writ of certiorari in the case has been presented to Justice Ginsburg, who extended the time until July 25, 2000. (pr28)

Relevant Docket Entries — Court of Appeals

7/26/00	Notice of filing petition for writ of certiorari for Appellant Sherman Walker dated 7/24/00 filed. Supreme Ct#: 00-121. (pr28)
10/20/00	Letter received from Deborah Wolikow Loewenberg, dated 10/18/00 re: enclosed my supplemental voucher for the preparation of a brief in opposition to a petition for a writ of certiorari, filed with the United States Supreme Court on October 12, 2000. I enclosed a copy of my opposition brief. (pr28)
11/16/00	Letter dated 11/13/00 from the Supreme Court advising of order GRANTING petition for writ of certiorari [1670720-1] by Appellant Sherman Walker, endorsed on motion form dated 7/26/00. filed. (Supreme Court # 00-121) The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted. limited to Question 1 presented by the petition. (pr20)

* * * *

RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

U.S. District Court
New York Eastern (Brooklyn)

CIVIL DOCKET FOR CASE #: 97-CV-3397

Walker v. Artuz

Filed: 06/10/97
Assigned to: Judge Sterling Johnson, Jr.
Demand: $0,000
Nature of Suit: 530
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

SHERMAN WALKER
petitioner

Sherman Walker
[COR LD NTC] [PRO SE]
92-A-7141
Greenhaven Correctional Facility
Draw B
Stormville, NY 12582-0445

v.

CHRISTOPHER ARTUZ, Superintendent
respondent

Relevant Docket Entries — District Court

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
6/10/97	1	PETITION for writ of habeas corpus; by Sherman Walker (ac) [Entry date 06/11/97]
6/10/97	—	Magistrate Chrein has been selected by random selection to handle any matters that may be referred in this case. (ac) [Entry date 06/11/97]
7/2/97	4	LETTER dated 6/30/97 from Sherman Walker to Judge Johnson, advising that the Court incorrectly filed his two petition's. (dg) [Entry date 08/05/97]
7/3/97	2	ORDER TO SHOW CAUSE: Petitioner is granted leave to proceed in forma pauperis; the Attorney General of the State of New York or, the District Attorney of Queens County, as attorney for respondents, show cause before this Court by the filing of a return to the petition, why a writ of habeas corpus should not be issued; within 20 days of receipt of this order, respondents shall serve a copy of their return on the petitioner herein and file the original thereof with proof of service with the Clerk of this Court; Petitioner, within 20 days of receipt by him or a copy of the return, shall file his reply, if any, with the clerk of this Court; and

		service of a copy of this OTSC shall be made by the clerk of this court by certified mail, together with a copy of the petition, to the Attorney General of the State of New York, and the District Attorney of Queens County, and by mailing a copy of this order to the petitioner. (signed by Judge Sterling Johnson Jr. on 6/30/97). c/m (dg) [Entry date 07/03/97]
7/3/97	3	CERTIFICATE OF SERVICE of OTSC and petition for writ of habeas corpus upon District Attorney of Queens County and NYS Attorney General Via Fedex on 7/3/97. (package tracking # 2293653364 and # 2293653375). (dg) [Entry date 07/03/97]
8/7/97	5	LETTER dated 7/22/97 from Efrem Z. Fischer to Judge Johnson, requesting an extension of time to respond to the petition from 7/27/97 to 8/26/97. (dg) [Entry date 08/07/97]
8/7/97	—	Endorsed order on doc. #5. Request granted until 8/26/97 to respond to the petition. (Signed by Judge Sterling Johnson Jr. on 7/23/97). (dg) [Entry date 08/07/97]
8/22/97	6	MOTION by Christopher Artuz to dismiss the writ of habeas corpus petition. Motion hearing <date not set> [6-1]. (tj) [Entry date 08/25/97]

Relevant Docket Entries — District Court

8/22/97	7	MEMORANDUM by Christopher Artuz in support of the [6-1] motion to dismiss the writ of habeas corpus petition. (tj) [Entry date 08/25/97]
10/14/97	8	REPLY AFFIDAVIT by Sherman Walker to motion to dismiss the writ of habeas corpus petition. (dg) [Entry date 10/14/97]
5/13/98	9	MEMORANDUM AND ORDER DISMISSING the [1-1] petition for a writ of habeas corpus. (signed by Judge Sterling Johnson Jr., dated 5/6/98) **Forwarded to Pro Se for a Judgment. (mrm) [Entry date 05/13/98]
5/18/98	10	JUDGMENT dated 5/15/98 that petitioner take nothing of respondent; that the petition for a writ of habeas corpus is dismissed as time barred; & that a certificate of appealability is denied. (Appeal package mailed). CM (lg) [Entry date 05/18/98]
5/18/98	—	Case closed. (lg) [Entry date 05/18/98]
6/19/98	11	NOTICE OF APPEAL by Sherman Walker Notice of Appeal and certified copy of docket sent appealing [10-1] judgment order, [9-1] order. IFP granted; Certificate of Appealability denied. Service made by clerk. (lizv) [Entry date 06/23/98]

Relevant Docket Entries — District Court

6/19/98	—	Notice of Appeal and certified copy of docket to USCA: [11-1] appeal (lizv) [Entry date 06/23/98]
6/23/98	—	Certified and transmitted record on appeal to U.S. Court of Appeals: [11-1] appeal. This record consists of doc# 1-11. PLEASE NOTE: NO STATE COURT RECORDS-PETITION TIME-BARRED. Acknowledgment requested. (lizv) [Entry date 06/23/98]
7/9/98	12	Acknowledgment from USCA received re: [11-1] appeal. Acknowledgment signed by R.R. on 6/24/98. (mm) [Entry date 07/09/98]
7/9/98	14	Letter dtd 7/1/98 from Marc Peta – USCA to Appeals Clerk re: request that the State Court Record be transferred by no later than 7/13/98. (mm) [Entry date 07/16/98]
7/16/98	13	Copy of Memo from Appeals Clerk to Marc Peta – USCA re: this is a time-barred case and therefore there is no State Court Record. (mm) [Entry date 07/16/98]
9/2/98	15	LETTER (with attachments) dated 8/25/98 from S. Walker to Judge Johnson requesting that the Court reconsider his habeas corpus petition. (tdh) [Entry date 09/08/98]

Relevant Docket Entries — District Court

9/2/98	16	MOTION (with exhibits) by Sherman Walker for reconsideration of [10-1] judgment order. No Motion hearing set. (tdh) [Entry date 09/08/98]
11/12/98	17	LETTER (undated) from S. Walker to Judge Johnson inquiring about the status of his motion for reconsideration. (tdh) [Entry date 11/30/98]
11/30/98	18	LETTER dated 11/27/98 from Ralph Vega, Jr. to Sherman Walker advising him that his motion for reconsideration is still pending and enclosing a copy of the docket sheet for this case. (tdh) [Entry date 11/30/98]
12/29/98	19	MANDATE OF USCA (certified copy) Re: [11-1] appeal. A motion having been made by petitioner-appellant pro se for a certificate of appealability, upon consideration, it is ordered that said motion be and is granted. The parties are ordered to brief the following issues: (1) whether the petitioner-appellant's first petition for writ of habeas corpus pursuant to 28 U.S.C. 2254 tolled the period of limitations set forth in 28 U.S.C. 2244(d)(2) and (2) whether the limitations period in Section 2244(d) may be equitably tolled where the prior, timely-filed Section 2254 petition did not file a new petition stating only exhausted claims until after the one-year grace period noted in Ross v.

		Artuz, 150 F.3d 97 (2d Cir. 1998). It is further ordered that counsel be appointed to represent the petitioner-appellant. Certified 12/18/98. Acknowledgment returned to USCA. Judge notified. USCA#98-2572. (mm) [Entry date 12/29/98]
2/17/99	20	LETTER dated 2/10/99 from S. Walker to Ralph Vega, Jr. inquiring about the status of his motion for reconsideration. (Pro Se sent docket sheet). (tdh) [Entry date 02/19/99]
3/5/99	21	LETTER dated 3/2/99 from S. Walker to Judge Johnson inquiring about the status of his motion for reconsideration. (tdh) [Entry date 03/25/99]
3/25/99	22	LETTER dated 3/24/99 from Ralph Vega, Jr. to Sherman Walker advising him that his motion for reconsideration is still pending. (tdh) [Entry date 03/25/99]
9/30/99	—	Endorsed order denying [16-1] motion for reconsideration of [10-1] judgment order (Signed by Judge Sterling Johnson Jr., on Sept. 27, 1998.) (tv) [Entry date 10/04/99]
10/14/99	23	LETTER (undated) from Judge Johnson's Chambers to Mr. Walker enclosing a copy of Judge Johnson's order that denied his motion for reconsideration of the Court's denial of his petition for a writ of habeas corpus. (tdh) [Entry date 10/20/99]

Relevant Docket Entries — District Court

4/24/00	24	MANDATE OF USCA (certified copy). On consideration whereof, it now hereby ordered, adjudged, and decreed that the judgment of said district court be and it hereby is reversed and the matter is remanded to said district court for further proceedings in accordance with the opinion of this court. Issued as Mandate: 4/17/00. Judge Notified. USCA# 98-2572. (lizv) [Entry date 04/26/00]
5/15/00	25	LETTER dated 5.10.00 from Sherman Walker to the Chief Court Clerk inquiring about the status of his petition. Pro Se Responded. (tdh) [Entry date 05/17/00] [Edit date 05/17/00]

[END OF DOCKET: 1:97cv3397]

ORDER OF THE SUPREME COURT OF THE UNITED STATES GRANTING CERTIORIARI DATED AND DECIDED NOVEMBER 13, 2000

SUPREME COURT OF THE UNITED STATES

00-121

GEORGE DUNCAN, SUPERINTENDENT,
GREAT MEADOW CORRECTIONAL FACILITY

v.

SHERMAN WALKER

* * *

PRIOR HISTORY: Reported below: 2000 U.S. App. LEXIS 5117.

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: The motion of respondent for leave to proceed *in forma pauperis* is granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted limited to Question 1 presented by the petition.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED DECEMBER 18, 1998

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of December one thousand nine hundred and ninety-eight,

Present:

Hon. James L. Oakes,
Hon. Dennis Jacobs,
Hon. Rosemary S. Pooler,
Circuit Judges.

98-2572

Sherman Walker,

Petitioner-Appellant,

v.

Christopher Artuz, Superintendent,

Respondent-Appellee.

A motion having been made herein by petitioner-appellant *pro se* for a certificate of appealability, upon consideration thereof, it is ordered that said motion be and it

hereby is granted. The parties are ordered to brief the following issues: (1) whether the petitioner-appellant's first petition for writ of habeas corpus pursuant to 29 U.S.C. § 2254 tolled the period of limitations set forth in 28 U.S.C. § 2244(d)(2), and (2) whether the limitations period in Section 2244(d) may be equitably tolled where the prior, timely-filed Section 2254 petition was dismissed without prejudice for failure to exhaust all claims and the petitioner-appellant did not file a new petition stating only exhausted claims until after the one-year grace period noted in *Ross v. Artuz*, 150 F.3d 97 (2d Cir. 1998). It is further ordered that counsel be appointed to represent the petitioner-appellant.

FOR THE COURT:
Carolyn Clark Campbell, Clerk

By: s/ Lucille Carr

DEC 18 1998

PETITION UNDER 28 U.S.C. § 2254 DATED MAY 20, 1997 WITH EXHIBIT C ATTACHED

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

UNITED STATES DISTRICT COURT

District	EASTERN
Name	SHERMAN WALKER
Prisoner No.	92A7141
Case No.	96 CV. 2946
Ind.	2/20#91
Place of Confinement	GREEN HAVEN CORRECTIONAL FACILITY

Name of Petitioner (include name under which convicted)
SHERMAN WALKER

v.

Name of Respondent (authorized person having custody of petitioner)
CHRISTOPHER ARTUS

The Attorney General of the State of:
New York, State Capitol, Albany, N.Y. 12224

Petition Dated May 20, 1997 with Exhibit C

PETITION

1. Name and location of court which entered the judgment of conviction under attack
   Supreme Court Crim. Term Part-K9 Queens Co., 125-01 Queens Boulevard, Kew Gardens

2. Date of judgment of conviction
   June 6, 1992

3. Length of sentence
   7 to 14 years

4. Nature of offense involved (all counts)
   Robbery in the First degree, one Count

5. What was your plea? (Check one)

* * *

(c) Nolo contendere ☑

* * *

8. Did you appeal from the judgment of conviction?
   Yes ☑ No ☐

9. If you did appeal, answer the following:

   (a) Name of Court
   APPELLATE DIVISION SECOND DEPART.

Petition Dated May 20, 1997 with Exhibit C

(b) Result
AFFIRMED

(c) Date of result and citation, if known
JUNE 12, 1995 / N/A

(d) Grounds raised
That the people failed to provide detective's affidavit for line up order prior to Wade hearing was reversible *Rosario*; The defendant was denied his Constitutional right to counsel at the lineup where the police had failed to contact defendant's retained counsel.

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court
New York State Court of Appeals

(2) Result
DENIED LEAVE TO APPEAL

(3) Date of result and citation, if known
January 15, 1996 / N/A

(4) Grounds raised
That the people failed to provide detective's affidavit for line up order prior to Wade hearing was reversible *Rosario*; The defendant was

Petition Dated May 20, 1997 with Exhibit C

denied his Constitutional right to counsel at the lineup where the police had deliberately failed to contact def. counsel as a matter of law.

* * *

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

* * *

A. Ground one:
Criminal Procedure Law Rosario Violation

Supporting FACTS (state *briefly* without citing cases or law)
That the people's failure to provide a copy of the detective's affidavit submitted in support to take-out order prior to wade hearing a reversible *Rosario* violation. Information in the line up order related to the subject matter of the officer direct testimony. Without this required document my defense at the hearing was hampered.

Petition Dated May 20, 1997 with Exhibit C

B. Ground two:

Supporting FACTS (state *briefly* without citing cases or law):
I was denied my right to counsel at Wade hearing where people knew defendant had retained counsel and where defendant requested that his retained counsel be present while at the precinct during the line-up, and that the officers were full aware that a lawyer had represented defendant on an unrelated case which were an outstanding (warrant) placing the officer on notice. (See Ex(B) enclosed herein).

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☑

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing
None

(b) At arraignment and plea
None

* * *

(d) At sentencing
Steven Greenfield
12 Melbourne, Great Neck, N.Y.

Petition Dated May 20, 1997 with Exhibit C

(e) On appeal
Alden T. Lewis
657 Fulton St., B'klyn., N.Y. 11217

* * *

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☑

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☐

(a) If so, give name and location of court which imposed sentence to be served in the future:
Supreme Court of New York County, 111 Centre Street, N.Y., N.Y. 10013.

(b) Give date and length of the above sentence:
Feb. 12th, 1992, 12½ to 25 yrs.

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☑ No ☐

The information herein

Petition Dated May 20, 1997 with Exhibit C

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

_____
Signature of Attorney (if any)

I declare under penalty of perjury
that the foregoing is true and correct.
Executed on May 20th, 1997.

s/ Walker, Sherman
Signature of Petitioner

* * *

Petition Dated May 20, 1997 with Exhibit C

EXHIBIT C

To be Argued by
Alden T. Lewis
(20 minutes)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Case No. 92-04929

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

– against –

SHERMAN WALKER,

Defendant-Appellant.

Heard on the
Original Record
Ind. No. 2120/91

BRIEF FOR DEFENDANT-APPELLANT

Alden T. Lewis
Attorney for Appellant
657 Fulton Street
Brooklyn, New York 11217
(718) 243-1550

* * *

Petition Dated May 20, 1997 with Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Case No. 92-04929

Ind. No. 2120/91

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

– against –

SHERMAN WALKER,

Defendant-Appellant.

Statement Pursuant to CPLR Section 5531

1. The indictment number in the court below was 2120/91.

2. The full names of the original parties were The People of the State of New York against Sherman Walker and Thomas Phillips. Thomas Phillips is not a party to this appeal.

3. This action was commenced in Supreme Court, Queens County in 1991 by the filing of an indictment.

4. This is an appeal from a judgment of the Supreme Court, Kings County, rendered June 6, 1992 convicting defendant, after a guilty plea of Robbery in the First Degree.

Petition Dated May 20, 1997 with Exhibit C

5. Appellant seeks a reversal of the conviction and a new trial, or, in the alternative, a reduced sentence.

6. This appeal is not being prosecuted by the appendix method.

Preliminary Statement

This is an appeal from a judgment of the Supreme Court, Queens County, rendered June 6, 1992 convicting defendant after a plea of guilty to Robbery in the First Degree (Penal Law Section 160.15) and sentencing him to a minimum term of seven years and a maximum term of fourteen years as a second felony offender, to run concurrently with a recently imposed sentence.

Notice of Appeal was timely filed. This Court granted Appellant leave to appeal as a poor person and appointed Alden T. Lewis as appellate counsel by order dated May 17, 1993. No application for a stay of the sentence was made and defendant is currently incarcerated.

Questions Presented

1. Was the People's failure to provide a copy of the detective's affidavit submitted in support of take-out order prior to Wade hearing a reversible *Rosario* violation?

2. Was defendant denied his right to counsel at Wade hearing where People knew defendant had retained counsel and where defendant requested that his retained counsel be present?

Petition Dated May 20, 1997 with Exhibit C

3. Did the defendant's appearance make the lineup impermissibly suggestive?

4. Should the defendant be resentenced where he received the maximum sentence as a result of going to trial on other cases and where the Court had just sentenced him on another case?

Statement of Facts

Background

Based on information from a confidential informant a detective obtained a photograph of the defendant and showed it to a robbery victim. The detective applied for a take-out order and a lineup was held wherein defendant was viewed by the victims of several jewelry store robberies. Shortly thereafter the defendant was arrested for the robbery of the Venice Jewelry store which occurred on September 19, 1990.

Wade Hearing

DETECTIVE JAMES REDMOND (Redmond) was called by the People. He has been a detective since 1980. The investigation of the September 19, 1990 robbery of Venice Jewelers began in January 1991 when the detective's supervisor instructed him to get in touch with a Detective Russo and a Detective Favilla, both of whom gave him the names of five individuals who were possible suspects, including the defendant. After obtaining photographs of the suspects he took them to complaining witness Nasim Farajian on January 25, 1991.

The detective went to Venice Jewelers and showed Farajian a stack of sixteen photographs. The photographs were marked and the detective had kept them in his case folder until time of trial. The case folders are kept in a file cabinet, which is accessible by others in the office. The photographs were admitted without objection.

Detective Redmond said that Farajian identified photographs of defendant and of Thomas Phillips. Farajian said that "Phillips . . . was the taller subject that had the gun and Mr. Walker, he said . . . this is the fellow that had the glasses on during the robbery" (W. 10-11)*

The detective was informed on March 22, 1991 that a take-out order had been approved. On 27th the detective removed defendant and Mr. Phillips from the Brooklyn jail and took them to the 109th Precinct for lineup. The two defendants were placed in the same room on opposite sides, with each side also containing five "fillers". Lineup viewers were only able to see one side of the room at a time; to see individuals on the other side the viewer had to go into another room (W. 16). Farajian first viewed the lineup with Sherman Walker. He identified him then went to the second room where he identified Thomas Phillips.

Photographs of the lineup were marked as px 1A and 1B. The detective said that the photographs were taken at a different angle than would be seen by a lineup viewer, but that otherwise the photographs were fair and accurate

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* Transcript pages preceded by a "W" refer to pages of the Wade hearing held December 31, 1991 [cover indicates 12/6/91]

representations of the lineup (W. 22). Px 3A through 3D were additional photographs of the same lineup.

On VOIR DIRE the witness said that he photographs were the same as those introduced at a Wade hearing with regard to Ind. No. 2119/91. The photographs were taken before the lineup but the detective doesn't know who took them. A picture was not taken each time a witness looked at suspects (W. 27-33).

Mr. Walker was involved in more than five lineups on March 27th. The Court did not allow any questions about any of the other lineups (W. 34). The lineup viewed by Farajian was the last one the defendant appeared in. The lineup photographs were admitted over objection.

Continued Wade Hearing

The hearing was continued on February 4, 1992**. Mr. Schwartz, counsel for co-defendant Phillips commenced cross examination. Detective Redmond recalled that Mr. Schwartz appeared at the lineup and that Mr. Schwartz told the detective that Sherman Walker wanted an attorney who had been assigned to him in Manhattan. The lineup consisted of the two defendants and ten fillers. All the participants maintained the same position for each successive viewing.

All together Detective Redmond was investigating seven jewelry store robberies. He didn't find out whether any of

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** Transcript pages preceded by a "WW" refer to pages of the Wade hearing held on February 4, 1992

the victims were known to each other. With regard to the September 19, 1990, Farajian was the only person he interviewed. As a result of the overall investigation several people viewed the same lineup on March 27th. The detective doesn't know if they spoke with each other.

The complaint follow-up report (DD5) prepared by the detective had been redacted. In chambers the People said "This is a confidential informant who did supply information to the Detective Redmond with regard to this investigation" (WW. 14). According to the People information from the other police led to the informant who confirmed the information that Detective Redmond had already received. The prosecutor argued that the informant's reliability was not an issue for the Wade hearing (WW. 15) . Defense counsel argued that probable cause is always at issue in a Wade hearing. The Court said that the name did not have to be provided after the People said that the confidential informant would not be called as a witness.

Detective Redmond said the confidential informant's name was provided by both detective he spoke with in January 1991. The Court sustained objections to "Where did you meet him?" and to "Did he have any pending cases?". The detective's notes of his interview of the confidential informant were on the same page of his notes of the conversation with Russo and Favilla. The People agreed to provide the notes with information about the confidential informant redacted. Defense counsel said that the notes should have been provided prior to the hearing. The People replied that they did not know about the notes.

Petition Dated May 20, 1997 with Exhibit C

The detective said that he showed the photographs in evidence to confidential informant. The confidential informant identified the defendant as the leader of a robbery ring. The detective said that he covered the photographs with plastic to simulate eyeglasses on the subject (WW. 34). The detective doesn't know if the confidential informant was paid or if he had previously provided information to the police. The confidential informant recognized most of the individuals in the photographs. He said that they were probably the ones involved in the robberies that the detective was investigating. Objection sustained to questions regarding whether the confidential informant witnessed the robbery.

The detective went to Farajian's store on on January 25, 99 at about 12:30 p.m. Farajian told him that a group of six individuals came into his store. The one with the gun was tall and the rest were of medium height. The witness did not furnish any additional descriptions. Farajian went through the stack of photographs. The detective again covered the photographs with plastic to simulate the wearing of glasses. Farajian said that Sherman Walker was the person who wore glasses during the robbery. After Farajian viewed the lineup Detective Redmond asked if he would be willing to view a lineup.

Detective Redmond said that he did not know that Mr. Walker had a pending case even though his notes referred to Mr. Walker's January 9, 1990 arrest and contained Mr. Walker's NYSID number. The detective said he didn't "run" the NYSID number. He explained that when Mr. Schwartz came in he only said that the defendant had an attorney in Manhattan, he didn't mention a Queens case. He didn't find

about the Queens case until he spoke with the A.D.A. on this case.

Wade Hearing February 11, 1992

The detective said that he applied for a take-out order but did not appear in court on March 22nd, the day that the order was signed (WWW. 5)***. The detective found out on the day of the lineup that Mr. Schwartz would represent both defendants. He said that he tried to call the attorney requested by the defendant but there was no answer.

Detective Redmond told the lineup witnesses to arrive between seven and nine o'clock and to wait downstairs when they arrived at the precinct (WWW. 9) Shortly after seven o'clock the detective went downstairs and explained the lineup procedure to the witnesses who had arrived. The witnesses were spread throughout the room; he brought them together to give them instruction (WWW. 15). The witnesses He then went back upstairs to help setup the lineup. Farajian didn't arrive until eight o'clock (WWW. 12, 13)

The first witness viewed the codefendant. The detective believes that the witness was escorted downstairs afterwards (WWW. 17). Mr. Walker was identified by other witnesses on other cases. Prior to viewing the lineup the witnesses were all brought upstairs and told to wait in the hallway outside the viewing area (WWW. 22). After viewing the lineup the witnesses didn't go back into the same hallway, they exited

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*** Transcript pages preceded "WWW" refer to pages of the Wade hearing held on February 11, 1992 in the morning

via different route. The detective doesn't recall if Schwartz went in to speak with the defendant after any of the separate viewings (WWW. 26).

Photographs of a lineup involving a different case were commingled with the photographs from this case. The Court did not allow defense counsel to inquire whether any of the witnesses from the different case viewed both lineups.

The Court said that it would give the defense some latitude on cross examination because of the other indictments. Counsel said that he didn't want to waive the right to any future hearings. The Court responded that the hearing would then be confined to the facts of Ind. No. 2120/91.

Farajian was the only person to view the lineup in the instant case (F4. 8, 15)****. The other witnesses had departed by the time Farajian arrived at 7:45 p.m. (F4. 19). Detective Redmond met him on he steps and escorted him upstairs. The detective said that he didn't select the fillers although he did fill out the lineup form (W4. 12). The court said that the lineup photographs speak for themselves when it sustained objections to questions about the physical appearance of the lineup participants.

Mr. Schwartz argued that there was no evidence that information from the confidential informant was reliable. He also said that the lineups were tainted by the gathering of the complaining witnesses on various cases where it was

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**** Transcript pages preceded by "F4" refer to pages of the Wade hearing held on February 11, 1992 in the afternoon

likely that they were known to each other. He added that two of the witnesses were father and son. The son viewed the lineup and then waited for his father who came late. As a result there was no separation of witnesses.

Mr. Greenfield argued that there was a conflict of interest where only one attorney represented both defendants at the lineup. The police in this case made insufficient efforts to contact the defendant's retained attorney. Counsel further argued that no evidence was produced to show that the confidential informant was reliable and that Farajian's photographic identification was tainted because Detective Redmond altered the photographs. Additionally the photographs showed that Sherman Walker stood out from the fillers (W4. 29-32).

The People responded that probable cause arose from the photographic identification and from he lineup, not from the confidential informant. "Drawing glasses" on the photographs not suggestive because it was done to all the photographs shown to the witness. Detective Redmond offered to let defendant chose his lineup position but he refused to do so. There was no taint regarding Farajian's identification because all the witnesses had left by the time he arrived at the precinct. The prosecutor also argued that the photographs of the lineup showed no suggestiveness due to defendant's appearance.

The Court denied the motion, saying that the role of the confidential informant was minimal.

Petition Dated May 20, 1997 with Exhibit C

Plea

The defendant entered an *Alford* plea to the charge of robbery in the first degree.

Sentence

The Court denied defendant's application to withdraw his plea. The basis of the application was that one of the prosecution witnesses whom the defendant believed was unavailable was now known to be available. The defendant was sentenced to a minimum of seven years and a maximum of fourteen years imprisonment, to run concurrently with the same sentence imposed on Ind. No. 6542/89.

ARGUMENT

POINT I THE PEOPLE'S FAILURE TO PROVIDE DETECTIVE'S AFFIDAVIT SUBMITTED IN SUPPORT OF TAKE-OUT ORDER PRIOR TO WADE HEARING WAS REVERSIBLE ROSARIO VIOLATION

Prior to the Wade hearing defense counsel requested a copy of the affidavit submitted by Detective Redmond in support of the order directing defendant to appear in a lineup. Prior to the start of trial counsel requested to reopen the Wade hearing based on information in the newly discovered affidavit. Although counsel obtained the affidavit, it was not until after the Wade hearing. Additionally, the court denied the defense motion to reopen the Wade hearing.

A prior statement by a witness who testifies at trial is clearly Rosario material. The detective's affidavit referred

to a confidential informant whose information helped launch this investigation. The trial court attempted to minimize the role of the informant but it is well-settled that defense counsel, not the prosecutor or the court "is in a far better position to appraise the value of a witness' pretrial statements for impeachment purposes" *People v. Rosario*, 9 N.Y.2d 286, 290, 213 N.Y.S.2d 448, 173 N.E.2d 881, cert. denied, 363 U.S. 866, 82 S.Ct. 117, 17 L.Ed.2d 64.

This evidence was critical because the alleged informant was known to the defendant. It is therefore likely that this information would have significantly affected the outcome of the trial. *People v. Jones*, 70 N.Y.2d 547, 550, 523 N.Y.S.2d 53, 517 N.E.2d 865 (1987) ("evidence must be material to the defense and would have in any reasonable likelihood, affected the judgment").

The People's failure to produce the requested Rosario material together with the trial court's failure to reopen the Wade hearing, amounted to a complete failure" to turn over the requested material. *People v. Ranghelle*, 69 N.Y.2d 56, 63, 511 N.Y.S.2d 580, 503 N.E.2d 1011 (1986). As a result there was per se error which requires reversal of the conviction and the ordering of a new trial.

POINT II DEFENDANT WAS DENIED HIS RIGHT TO COUNSEL AT THE LINEUP WHERE THE POLICE FAILED TO CONTACT DEFENDANT'S RETAINED COUNSEL

Defendant acknowledges that the right to counsel does not attach until the formal initiation of a prosecution.

People v. Hawkins, 55 N.Y.2d 474, 483, 450 N.Y.S.2d 159, 435 N.E.2d 376 (1982). In this case, however, defendant had retained counsel on Ind. No. 6542/89. Defendant's retained counsel could not be excluded from the lineup in this case unless his arrival caused unreasonable delay. *Hawkins*, 55 N.Y.2d at 486, 450 N.Y.S.2d at 166, 435 N.E.2d at __. "Pertinent to this consideration is whether the delay would result in significant inconvenience to the witnesses or would undermine the substantial advantage of a prompt identification confrontation" *Ibid.*

The take-out order in this case was signed March 22, 1991. The lineup was not held until five days later. Thus there was no question of a prompt investigation or witnesses' convenience. The police knew or should have known that defendant had an attorney because he was incarcerated. The Assistant District Attorney who submitted the order should have known the defendant had an attorney because he had an open case in Queens Supreme Court. Moreover, it is undisputed that the defendant unequivocally requested the presence of his retained counsel.

"Though law enforcement authorities ordinarily are not required to notify counsel of an impending investigatory lineup absent a specific request to do so, when the police are aware that a criminal defendant is represented by counsel and the defendant explicitly requests this assistance of his attorney, the police may not proceed with the lineup without at least apprising the defendant's lawyer of the situation and affording him or her an opportunity to appear" *People v. Coates*, 74 N.Y.2d 244, 249, 544 N.Y.S.2d 992, 994, __ N.E.2d __ (1989).

Petition Dated May 20, 1997 with Exhibit C

The single last-minute telephone call made by the detective is insufficient evidence of an acceptable effort to contact the attorney under the circumstances of this case. Moreover, the police knew that defendant was going to be viewed by several robbery victims. As a result the failure to promptly notify defendant' counsel is even more egregious.

POINT III THE DEFENDANT'S APPEARANCE MADE THE LINEUP SUGGESTIVE

The defendant concedes that lineup fillers are not required to match his appearance exactly. *People v. Rodriguez*, 124 A.D.2d 611, 507 N.Y.S.2d 757 (2d Dep't 1986). Yet "[t]he issues involved in ascertaining the validity of a lineup identification concerns "undue suggestiveness" which is determined by considering the totality of he circumstances surrounding the lineup" (*Ibid.*).

In this case the defendant's complexion and his clothing made him stand out from the fillers. These features were aggravated by the lighting conditions in the viewing area. Additionally defendant likely stood out more because of the police practice of getting fillers from men's shelters. The trial court simply made a factual error when it determined that the lineup photographs showed that the fillers were sufficiently similar to the defendant.

Petition Dated May 20, 1997 with Exhibit C

IV THE DEFENDANT SHOULD BE RESENTENCED

A. *The Defendant Received an Excessive Sentence*

A defendant may not be punished for asserting his right to trial. At the same time the mere fact that a defendant received enhanced punishment after trial is not proof of vindictiveness. *People v. Patterson*, 106 A.D.2d 520, 483 N.Y.S.2d 55 (2d Dep't 1984). In this case it appears that a plea bargain was offered wherein in exchange for his guilty plea on this case and others before the Court the defendant would receive "little" additional prison time.

The codefendant was allowed to plead guilty to Attempted Robbery in the Second Degree. He was sentenced to three to six years. According to the eyewitness the codefendant was the one with the gun. There was no injury in this case and the defendant maintained his innocence throughout. It appears that the court only considered the defendant' prior record when it imposed sentence.

B. *The Defendant Should Be Resentenced in front of Different Judge*

The defendant was entitled to be sentenced in front of a different judge where the judge had recently sentenced him on two unrelated case. Clearly there was an abuse of discretion where the defendant with the weapon is sentenced to less than half the sentence of the defendant.

Petition Dated May 20, 1997 with Exhibit C

For these reasons defendant's sentence should be reduced in the discretion of this Court. Alternative, this Court should remand this matter for resentencing.

CONCLUSION

Defendant's conviction should be reversed and a new trial ordered, alternatively the defendant's sentence should be reduced.

Respectfully submitted,

Alden T. Lewis
657 Fulton Street
Brooklyn, New York 11217
(718) 243-1550

to: Honorable Charles Hynes
District Attorney, Kings County
210 Joralemon Street
Brooklyn, New York 11201

Clerk of the Court
Appellate Division of
The Supreme Court
45 Monroe Place
Brooklyn, New York

RESPONDENT'S NOTICE OF MOTION TO DISMISS DATED AUGUST 22, 1997 WITH EXHIBITS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

97 Civ. 3397 (SJ) (ASC)

Pro Se

SHERMAN WALKER,

Petitioner,

– against –

CHRISTOPHER ARTUZ, Superintendent,
Green Haven Correctional Facility,

Respondent.

NOTICE OF MOTION

PLEASE TAKE NOTICE, that, upon the memorandum of law transmitted herewith, the respondent will move this Court, before the Honorable Sterling Johnson, Jr., United States District Judge, at United States Court House, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, on September 25, 1997, for an order pursuant to the new Antiterrorism and Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), dismissing the petitioner's application for a writ of habeas corpus for failure to comply with the one-year statute of limitation and for any further relief as this Court deems just and proper.

Respondent's Notice of Motion to Dismiss

Dated: August 22, 1997
New York, New York

Respectfully submitted,

DENNIS C. VACCO
Attorney General of the
State of New York
120 Broadway
New York, New York 10271

Respondent's Notice of Motion to Dismiss

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

97 Civ. 3299 (SJ) (ASC)

Pro Se

SHERMAN WALKER,

Petitioner,

– against –

CHRISTOPHER ARTUZ, Superintendent,
Green Haven Correctional Facility,

Respondent.

AFFIRMATION IN SUPPORT

EFREM Z. FISCHER, an attorney at law, duly admitted to practice before this court, affirms under the penalties of perjury that the following facts are true:

1. That I am an Assistant Attorney General to Dennis C. Vacco, Attorney General of the State of New York, attorney for the respondent herein and submit this Affirmation in Support of respondent's Motion to Dismiss this habeas corpus petition.

2. Petitioner filed this application for a writ of, habeas corpus on June 10, 1997. *See* Petition, Page 2, dated May 20, 1997.

Respondent's Notice of Motion to Dismiss

3. Said application for a writ of habeas corpus is untimely and should be dismissed pursuant to the Anti-terrorism and Death Penalty Act of 1996 ("AEDPA") since petitioner has filed his petition beyond the one year statute of limitation period and the law is clear that such a filing is untimely and should be dismissed.

4. That annexed hereto as Exhibit A is a copy of the decision of the New York Court of Appeals denying leave to appeal, *i.e.*, petitioner's last state court action.

5. Annexed hereto as Exhibit B is a courtesy copy of *Oppenheimer v. Kelley*, 1997 WL 362216 (S.D.N.Y. Chin, J, June 27, 1997).

6. Annexed hereto as Exhibit C is a courtesy copy of *Lee v. Artuz*, 1997 WL 405329 (S.D.N.Y. Stein, J, June 24, 1997).

7. Annexed hereto as Exhibit D is a courtesy copy of *Kirby v. Senkowski*, 1997 WL 399663 (S.D.N.Y. Chin, J, July 15, 1997).

8. That petitioner has failed to act for over a year past the date of his last state court action before asserting his alleged federal claim and waited over one year after the effective date of the AEDPA before filing the petition.

9. That based upon the Exhibits annexed hereto and the Memorandum of Law submitted herewith, this petition for a writ of habeas corpus must be dismissed as a matter of law because it is untimely.

Respondent's Notice of Motion to Dismiss

WHEREFORE, the respondent preys that this court dismiss the petitioner's application for a writ of habeas corpus and that if said relief is denied, respondent respectfully requests additional time to respond on the merits.

Dated: August 22, 1997
New York, New York

Respectfully submitted,

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for respondent
By:

s/ Efrem Z. Fischer
EFREM Z. FISCHER (EZF-3860)
120 Broadway
New York, New York 10271
(212) 416-8591

Efrem Z. Fischer
Assistant Attorney General
Of Counsel

Respondent's Notice of Motion to Dismiss

EXHIBIT A

State of New York
Court of Appeals

Court of Appeals Hall
Albany, New York 12207

George Bundy Smith
Judge

January 5, 1996

Mr. Sherman Walker
#895950275631A9
14-14 Hazen Street
East Elmhurst, NY 11370

Re: *People v. Sherman Walker*
Indictment Nos. 2120/91 and 6542/89
Supreme Court, Queens County

Dear Mr. Walker:

Enclosed you will find copies of four orders signed today dismissing your applications for permission to appeal to the Court of Appeals in the above-referenced cases.

Very truly yours,

s/ George Bundy Smith
George Bundy Smith

GBS:ba

cc: Hon. Richard A. Brown
District Attorney, Queens County

Clerk's Office
Court of Appeals

Respondent's Notice of Motion to Dismiss

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. GEORGE BUNDY SMITH,
Associate Judge

Ind. No. 6542/89
2120/91

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

SHERMAN WALKER,

Appellant.

I, GEORGE BUNDY SMITH, Associate Judge of the Court of Appeals of the State of New York, certify that the application by the defendant-appellant for a certificate to appeal pursuant to Section 460.20 of the Criminal Procedure Law is dismissed because application for the same relief has already been made to and denied by order of the Appellate Division dated October 3, 1995 (CPL Section 460.20; *People* v. *McCarthy*, 250 NY 358, 361).*

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* Description of Order: Order of the Appellate Division, Second Department, dated June 12, 1995, affirming a judgment of Supreme Court, Queens County, rendered February 27, 1992.

Respondent's Notice of Motion to Dismiss

Dated: Albany, New York
January 5, 1996

s/ George Bundy Smith
Associate Judge

Respondent's Notice of Motion to Dismiss

EXHIBIT B

UNITED STATES DISTRICT COURT
S.D. NEW YORK.

No. 97 CIV. 3035(DC).

RAFAEL OPPENHEIMER

v.

WALTER R. KELLY,

Respondent.

June 27, 1997.

MEMORANDUM DECISION

CHIN, District Judge.

Rafael Oppenheimer has petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner seeks to have this Court set aside his November 19, 1986 conviction for Attempted First Degree Murder and Second Degree Criminal Possession of a Weapon. For the following reasons I find that the petition is barred by the one-year period of limitation set forth in 28 U.S.C. § 2244(d)(1), and, thus, the petition is hereby dismissed.[1]

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1. Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts allows a court to order summary dismissal of a habeas corpus petition if the petitioner is not entitled to relief in the district court.

DISCUSSION

Section 101 of the Antiterrorism and Effective Death Penalty Act (the "AEDPA")[2] amended 28 U.S.C. § 2244 to require a one-year period of limitation for the filing of a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period, with certain exceptions, begins to run after the completion of direct review of the judgment by the state courts. 28 U.S.C. § 2244(d)(1)(A). The one-year limitation period in § 2244(d)(1), however, does not apply to habeas petitions filed before the enactment of the AEDPA. Reyes v. Keane, 90 F.3d 676, 679 (2d Cir.1996). Nevertheless, "where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition," he need not be accorded a full year after the effective date of the AEDPA to file a habeas corpus petition in federal court. Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir.1997). Rather, the prisoner need only be given a "reasonable" period of time after the effective date of the AEDPA to file his petition. Id. (holding that a petition filed 72 days after the effective date of the AEDPA was filed within a reasonable period of time).

In the present case, state court direct review of petitioner's conviction ended on December 20, 1989. Thus, petitioner took more than seven years to "contemplate" bringing his petition for habeas corpus review. Moreover, petitioner did not file this petition until April 9, 1997 — 350 days after the effective date of the AEDPA. I find that filing

2. The AEDPA, Pub.L. No. 104-132, 1996 U.S.Code Cong. & Ad. News (110 Star) 1214, was signed by the President, and became effective, on April 24, 1996.

the petition 350 days after the AEDPA took effect did not constitute filing within a "reasonable" period of time. To hold otherwise would have the effect of ignoring the holding of Peterson v. Demskie. Certainly, in determining that there is "no need to accord a full year after the effective date of the AEDPA" for the filing of a petition, the Second Circuit could not have meant to suggest that 350 days — just fifteen days shy of a full year — is required.

CONCLUSION

For the foregoing reasons, the petition is dismissed.

SO ORDERED.

Respondent's Notice of Motion to Dismiss

EXHIBIT C

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

No. 97 Civ. 3190 (SHS)(AJP).

DAVID LEE,

Petitioner,

v.

CHRISTOPHER ARTUZ, Superintendent of Green Haven Correctional Facility,

Respondent.

June 24, 1997.

STEIN

In a "Report and Recommendation" dated May 21, 1997, U.S. Magistrate Judge Andrew J. Peck recommended that:

Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be dismissed on the grounds that his petition is untimely pursuant to the one year limitation period imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA").

Written objections to the "Report and Recommendation" have not been filed with the Court by petitioner and the time

in which to file such objections has expired pursuant to 28 U.S.C. § 636(b)(1) and Fed.R.Civ.P. 72(b).

Upon review de novo of Magistrate Judge Peck's "Report and Recommendation" dated May 21, 1997,

IT IS HEREBY ORDERED that:

1. Petitioner's application for a writ of habeas corpus is dismissed on the grounds that his petition is untimely pursuant to the one year limitation period imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA").

2. As petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253, as amended by the AEDPA; see also Rodriquez v. Scully, 905 F.2d 24 (2d Cir.1990) (per curiam) (discussing issuance of a certificate of probable cause under standard prior to amendment of 28 U.S.C. § 2253); Alexander v. Harris, 595 F.2d 87, 90-91 (2d Cir.1979).

3. Pursuant to 28 U.S.C. § 1915(a) the Court certifies that any appeal from this Order would not be taken in good faith.

Respondent's Notice of Motion to Dismiss

REPORT AND RECOMMENDATION

ANDREW J. PECK, United States Magistrate Judge:

To the Honorable Sidney H. Stein, United States District Judge:

Pursuant to Rule 4 of the Rules Governing Section 2254 cases in the United States District Courts, 28 U.S.C. foll. § 2254, I recommend that the Court summarily dismiss petitioner David Lee's habeas corpus petition on the ground that he is not entitled to relief, since his April 18, 1997 petition is untimely under the one-year limitation period imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA").[1]

FACTS

Petitioner David Lee's habeas petition is dated April 18, 1997 and was received by the Court's Pro Se Office on April 24, 1997. (See Petition.) The Petition indicates that on December 15, 1983, Lee was convicted of second degree murder and first degree rape and sentenced to 25 years to life imprisonment. (Petition §§ 1-4.) The Appellate Division, First Department affirmed his conviction on May 19, 1988. People v. Lee, 140 A.D.2d 1011, 529 N.Y.S.2d 928 (1st Dep't 1988). (See Petition § 9.) The Court of Appeals denied leave to appeal on August 19, 1988. People v. Lee, 72 N.Y.2d 920, 532 N.Y.S.2d 854, 529 N.E.2d 184 (1988). (See Petition § 9.)

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1. Because of this Report and Recommendation to dismiss, the Court need not decide Lee's application for appointment of counsel.

As previously noted, Lee's federal habeas petition is dated April 18, 1997 and was received by the Court's Pro Se Office on April 24, 1997. It raises the same issue he previously raised on direct appeal — that his conviction was obtained by the testimony of an accomplice without corroborative evidence. (See Petition § 9(d), § 12.)

ANALYSIS

THE AEDPA'S ONE-YEAR STATUTE OF LIMITATIONS

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act. The AEDPA significantly modified § 2254 for non-death penalty cases. Specifically, the AEDPA instituted a one-year statute of limitations for habeas petitions:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.

28 U.S.C. § 2244(d)(1) (as amended by the AEDPA).

In Peterson v. Demskie, 107 F.3d 92 (2d Cir.1997), the Second Circuit held that "where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year after the effective date of the AEDPA." 107 F.3d at 93. Rather, the Court gave the prisoner a "reasonable time" after enactment of the AEDPA to bring his habeas petition. Id. (finding

petition brought 72 days after enactment of AEDPA to be timely).

Here, counting from the Court of Appeal's denial of leave to appeal, the one-year limitation period would have run no later than August 1989. Thus, Lee must be allowed a "reasonable time" after the April 24, 1996 enactment of the AEDPA to bring his federal habeas petition. Lee did not file his petition, however, until April 18, 1997 (giving him the benefit of the doubt) — just 6 days short of a year after enactment of the AEDPA. The Court need not decide where between 72 days (upheld in Peterson) and one year the line should be drawn. But if the Second Circuit's Peterson v. Demskie decision is to have any meaning, Lee's Petition, filed just 6 days short of a year and based on the same ground he previously raised in his 1988 direct appeal, is untimely. Under the AEDPA, therefore, Lee's Petition should be dismissed with prejudice.

CONCLUSION

For the reasons set forth above, the Court should dismiss with prejudice Lee's petition as barred by the AEDPA's one-year statute of limitations.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from receipt of this Report to file written objections. See also Fed.R.Civ.P. 6. Such objections (and

any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Sidney H. Stein, 500 Pearl Street, Room 1010, and to the chambers of the undersigned, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Stein. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir.1993), cert. denied, 513 U.S. 822, 115 S.Ct. 86, 130 L.Ed.2d 38 (1994); Roldan v. Racette, 984 F.2d 85, 89 (2d Cir.1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir.), cert. denied, 506 U.S. 1038, 113 S.Ct. 825, 121 L.Ed.2d 696 (1992); Small v. Secretary of Health & Human Servs., 892 F.2d 15, 16 (2d Cir.1989); Wesolek v. Canadair Ltd., 838 F.2d 55, 57- 59 (2d Cir.1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir.1983); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a), 6(e).

EXHIBIT D

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

No. 97 CIV. 3329 (DC).

TIMOTHY KIRBY,

Petitioner

v.

WARDEN DANIEL A. SENKOWSKI,

Respondent.

July 15, 1997.

CHIN, District Judge.

Timothy Kirby has petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner seeks to have this Court set aside his February 17, 1986 conviction for Murder in the Second Degree. For the following reasons I find that the petition is barred by the one-year period of limitation set forth in 28 U.S.C. § 2244(d)(1), and, thus, the petition is hereby dismissed.[1]

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1. Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts allows a court to order summary dismissal of a habeas corpus petition if the petitioner is not entitled to relief in the district court.

DISCUSSION

Section 101 of the Antiterrorism and Effective Death Penalty Act ("AEDPA")[2] amended 28 U.S.C. § 2244, to require a one year period of limitation for the filing of a petition for a writ of habeas corpus by a person if custody pursuant to the judgment of a state court. The limitation period, with certain exceptions, begins to run after the completion of direct review of the judgment by the state courts. 28 U.S.C. § 2244(d)(1)(A). The one year limitation period in § 2244(d)(1), however, does not apply to habeas petitions filed before the enactment of the AEDPA. Reyes v. Keane, 90 F.3d 676 679 (2d Cir.1996). Nevertheless, "where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition," he need not be accorded a full year after the effective date of the AEDPA to file a habeas corpus petition in federal court. Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir.1997). Rather, the prisoner need only be given a "reasonable" period of time after the effective date of the AEDPA to file his petition. Id. (holding that a petition filed 72 days after the effective date of the AEDPA was filed within a reasonable period of time).

In the present case, state court direct review of petitioner's conviction ended on September 6, 1988. Thus, petitioner took almost nine years to "contemplate" bringing his petition for habeas corpus review. Moreover, petitioner did not file this petition until April 15, 1997 — 356 days

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2. The AEDPA, Pub.L. No. 104-132 1996 U.S.Code Cong. & Ad. News (110 Stat) 1214, was signed by the President, and became effective, on April 24, 1996.

after the effective date of the AEDPA. I find that filing the petition 356 days after the AEDPA took effect did not constitute filing within a "reasonable" period of time. To hold otherwise would have the effect of ignoring the holding of Peterson v. Demskie. Certainly, in determining that there is "no need to accord a full year after the effective date of the AEDPA" for the filing of a petition, the Second Circuit could not have meant to suggest that 356 days — just nine days shy of a full year — is required.

CONCLUSION

For the foregoing reasons the petition is dismissed.

SO ORDERED.

PETITIONER'S REPLY AFFIDAVIT DATED SEPTEMBER 17, 1997 WITH EXHIBITS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

97 Civ. 3397 (SJ)
97 Civ. 3398 (SJ)

Pro Se

SHERMAN WALKER,

Petitioner,

– against –

Artuz, Superintendent
Green Haven Corr. Fac.,

Respondent.

Reply Affidavit

I, Sherman Walker, duly state that I affirm under the penalties of perjury that the following facts are true:

(1). That I am a pro se litigant involved in the above matter before Your Honor Court, and I submit this affidavit in support of my initial application to proceed on a habeas corpus petition in all due respect to the Court.

(2). Respondents in this matter claim my petition for a writ of Habeas Corpus is untimely filed and should be

dismissed pursuant to the Anti-terrorism and Death Penalty Act of 1996 ("A.E.D.P.A."). Since my second application was filed with the Clerk of the Court on June, 1997, respondent claim a year beyond the one year statute of limitation period that the instant application should be dismissed. I most definitely disagree that my application should not be dismissed as untimeliness.

(3). That petitioner shall directly address the respondent's remark listed in their Memorandum of Law pages (1) through (6) therein urging Your Honor to deny me the much needed right to proceed on my Federal Habeas Corpus pursuant to 28 U.S.C. Sec. 2254(b) alleging an outright unfair trial and an unlawful conviction.

(4). Petitioner's application for leave to appeal to the New York State Court of Appeals was denied on Jan., 1996. *People* v. *Walker*, 87 N.Y.2d 926 (1996). Petitioner duly argue that his case position is well within the new statute of limitations. Petitioner register (3) objections to the respondent legal argument.

(5). First, my initial filing of my application were submitted with the Clerk of this Court on June 18th, 1996. [See, Ex. (A) appended proof of court receipt of my petition with exhibits]. The application was docket under 96 CV 2946 by pro se staff attorney Aliza Silber during that time. Your Honor had denied the by order dated July 16, 1996, [see, Ex. (1) appended at page (4) til (5) of Court Order]. Moreover, Your Honor had rendered that I had presented a lack of clearly stated exhausted State Court Claims specifying the claims litigated on my state appeal.

Petitioner's Reply Affidavit with Exhibits

[See, Ex. (B) supra Court order at page (4) til (5)]. Accordingly, my petition was dismissed without prejudice. Petitioner, therefore, stresses that this period of time computation toward the one year limitation stops from the date of his initial filing with this Court on June 18th, 1996, or based on Your Honor ruling of July 16, 1996, I respectfully submit that for this Court not to allow me to proceeding from the initial juncture of June 18, documented with this Court or from July 16, the dismissal juncture. Such a dismissal would diminish a substantive right or a prudent available remedy on having my State issues heard which the respondent attempts to water down with an incorrect argument grabbing for straws and rushing for judgment. I should be given the benefit of doubt. I agree the one year started running on Jan. 5, 1996, from the NEW YORK COURT OF APPEAL denied me leave to appeal. However, I properly filed my petition on June 18, 1996 which became final on July 16, 1996. At that time, only two months and a few days had elapsed and more than ten months remained of the one year period for statute of limitation. Because my initial application sparked a properly filed writ of habeas corpus, the one year period was met long before any considerable delay had elapsed was irrelevant to my second filing of June 10, 1997. As a pro se litigant it can not be said I failed to act diligently. Secondly, in further opposition to respondent's position, counting from January 5, 1996 til June 10, 1997, there was no serious deliberating time span between the state final judgment til the second filing of my motion; the direct state appeal review had only became final one year slightly from petitioner second habeas corpus filing which should not bar review of petitioner's application. As cited by the respondent at page four of their motion to dismiss

paragraph 9-10 of the recent decision(s), applying *Peterson* v. *Dempsky*, 107 F.3d 92 (2d Cir. 1997), in those cases cited by respondent in their exhibits presented before Your Honor, all of the petitioners in those cases had had year(s) to contemplate bringing their federal habeas corpus petition and did not do so, the Second Circuit in Peterson held there and in new similar situation alike there was no need to allow a full year after the enactment of the Statute. Here, my direct appeal finalized relatively well within the bounds of the most logicalistic "reasonable period" standard invoked in *Peterson*. There was absolutely no lengthy contemplation period alive in my factual circumstances before I brought my two federal habeas corpus Petition in close intervals of each other (see, 28 U.S.C. Sec. 2244(d), (2)). I ask in humility based on the above that my petition not be dismissed. Lastly, respondent have utterly failed to satisfy even remotely it burden of demonstrating particular prejudice, how I cause such prejudiced by filing my application less than a one year mark — nor had I neglected years before bringing on the instant application for a writ, and that I was not diligent (please, see, N.Y.L.J. Aug. 8th, 1997, page (2) Col;. (3), *Hughes* v. *Irvins* Supt. Wende Corr. Fac. 97 CV 365 (E.D.N.Y. June 25, 1997). By Judge Raymond J. Dearie denying "respondent's" motion to dismiss a habeas corpus untimely or barred by laches.

WHEREFORE, Petitioner pray deeply for this Court to forwith allow me to proceed on the merit of my application and for such other grants this Court deem lawful.

Petitioner's Reply Affidavit with Exhibits

__ day of _____, 1997.

I, *Sherman Walker*, declare the above is true under the penalties of perjury

s/ Sherman Walker

To: Efrem Z. Fischer
Assistant Attorney General
120 Broadway
N.Y., N.Y. 10271

Petitioner's Reply Affidavit with Exhibits

EXHIBIT (A)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT C. HEINEMANN
CLERK

JAMES GIOKAS
CHIEF DEPUTY

June 18, 1996

Sherman Walker
92 A 7141
Drawer B
Stormville, NY 12582-0010

Re: 96-CV-2946 (SJ)

Dear Pro Se Litigant:

This will acknowledge receipt of your complaint. The case has been docketed under the above number and assigned to the Honorable Sterling Johnson, Jr. Your submitted documents have been forwarded to Judge Johnson's for consideration.

Please be advised of the following:

— documents submitted for filing should be originals and *must* contain an original signature;

— an affidavit of service must be included with all documents sent in for filing;

— all documents should be sent to the Pro Se Office at the Brooklyn courthouse. DO NOT send any paperwork directly to chambers unless directed to do so by the Judge as mailing your papers to chambers will delay processing;

— it is your duty to keep this office informed of any change of address;

— copies of all items filed in your case will be mailed to you by either the Clerk or opposing counsel. It is your responsibility to retain those copies, as well as copies of any documents you file, and monitor the progress of your action yourself.

Sincerely yours,

s/ Erin A. Cottingham
Erin A. Cottingham
Pro Se Writ Clerk

Petitioner's Reply Affidavit with Exhibits

EXHIBIT (B)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

96 CV 2946

SHERMAN WALKER,

Plaintiff,

– against –

THE LEGAL AID SOCIETY, PHILIP WEINSTEIN, JOEL ATLAS, JAMES BRANDEN, HILLAR WIESE, ALDEN LEWIS, SAMUEL FELDMAN, and CHRISTOPHER ARTUZ, Superintendent of the GREEN HAVEN CORRECTIONAL FACILITY,

Defendants.

MEMORANDUM AND ORDER

* * *

JOHNSON, District Judge:

Sherman Walker ("plaintiff" or "Walker"), appearing *pro se*, brings this action pursuant to 42 U.S.C. § 1983 alleging that a number of lawyers associated with the Legal Aid Society and in private practice violated his right to counsel and due process of the law. Plaintiff also seeks habeas corpus relief pursuant to 28 U.S.C. § 2254. For the

reasons stated below, the motion to proceed *in forma pauperis* is granted, but the complaint is dismissed *sua sponte* in accordance with 28 U.S.C. § 1915(d).

BACKGROUND

In three separate state court trials — one in New York County, and two in Queens County — Plaintiff was convicted on robbery charges. In each case, the Legal Aid Society was appointed to represent plaintiff in the appeal of his conviction. In the course of representing Walker, however, it became apparent that the Legal Aid Society already represented a confidential informant who had been a primary source of information leading to plaintiff's arrest. Because representing both clients would pose a conflict of interest, the Legal Aid Society formally moved to be relieved as counsel on plaintiff's appeals. The state appellate courts granted this motion and appointed new counsel to prosecute plaintiff's appeals.

Walker now argues that no confidential informant existed and thus that there was no conflict of interest preventing the Legal Aid Society from representing him. Plaintiff contends that, although he notified the Legal Aid Society of this fact, they failed to investigate his claim. Plaintiff argues that the Legal Aid Society's improper withdrawal denied him of his right to the counsel of his choice and due process of the law.

Accompanying plaintiff's complaint was an application to proceed *in forma pauperis*.

Petitioner's Reply Affidavit with Exhibits

DISCUSSION

Under 28 U.S.C. § 1915, a district court may dismiss a case in which the plaintiff has applied to proceed *in forma pauperis* "if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d). The Second Circuit follows a two-step approach in establishing eligibility to proceed *in forma pauperis* by first assessing a plaintiff's financial status, followed by a determination as to the frivolousness of the action. *See Anderson v. Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983).

Applying the two-step approach to the present case, this Court finds that plaintiff satisfies the financial requirements to proceed *in forma pauperis*. Based on the allegation of poverty stated in his declaration, the Court is convinced that Walker is unable to pay the costs and filing fees in connection with this suit. Thus, plaintiff's motion for leave to proceed *in forma pauperis* is granted.

Nevertheless, plaintiff's complaint must be dismissed. First, to establish a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate that the conduct complained of was committed by a person acting under the color of state law and that the conduct deprived the plaintiff of a federal right. *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996). The United States Supreme Court has stated unequivocally that court-appointed lawyers do not act under color of state law within the meaning of § 1983. *See Polk County v. Dodson*, 454 U.S. 312 (1981) (public defender does not act under color of state law); *Cassidento v. Hammer*, 1995 WL 722536 (2d Cir. 1995) (court-appointed attorney does not act under color of state law). As such, plaintiff's claims against all of the

individual attorneys as well as the Legal Aid Society must be dismissed. *See Pino v. Ryan*, 49 F.3d 51 (2d Cir. 1995) (*sua sponte* dismissal may be based on an affirmative defense that appears on the face of the complaint).

Plaintiff's claim for habeas corpus relief also must be dismissed for failure to adequately set forth his claim. For instance, although plaintiff refers to state appellate proceedings relating to his robbery convictions, he fails to specify the claims litigated in those appeals. Because this court cannot determine which issues have been properly exhausted in state court, the essential allegations of a habeas corpus action have not been presented. *See* 28 U.S.C. § 2254(b) (writ of habeas corpus "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State"). Therefore, this claim is dismissed without prejudice.

CONCLUSION

For the reasons stated herein, plaintiff's motion to proceed *in forma pauperis* is granted. However, the Court finds plaintiff's complaint to be frivolous within the meaning of 28 U.S.C. § 1915(d), since it fails to state a cognizable claim under 42 U.S.C. § 1983 or 28 U.S.C. § 2254. Accordingly, plaintiff's complaint is dismissed without prejudice.

SO ORDERED.

s/ Sterling Johnson, Jr.
U.S.D.J.

Dated: Brooklyn, New York
July 9, 1996

VERIFIED COMPLAINT DATED APRIL 10, 1996

CV 96 2946

SHERMAN WALKER,

Plaintiff-Appellant,

– against –

LEGAL AID SOCIETY ex rel, 15 Park Row, N.Y., N.Y.; PHILIP L. WEINSTEIN; JOEL ATLAS, JAMES M. BRANDEN; HILLARD WIESE, ESQ.; ALDEN T. LEWIS, ESQ., 527 Quincy St., Brooklyn, N.Y. 11221; SAMUEL FELDMAN, ESQ., 350 Broadway, N.Y., N.Y. 10013,

Defendants,

– against –

ARTUS, SUPERINTENDENT OF GREEN HAVEN CORRECTIONAL FACILITY,

Defendant.

VERIFIED COMPLAINT
TRIAL DEMANDED

Plaintiff, by his *pro se* petition, complains of the defendants and respectfully shows to this Court, alleges that defendants violated certain rights guaranteed under the United States Constitution by harming the Plaintiff by means of delayed imprisonment, discrimination, negligent, nominal misrepresentation by permitting a pattern of illegal

procedures and illegal treatment and abuse which was known to them or which should have been known to them under the law to take place against the plaintiff.

JURISDICTION

This action is brought pursuant to 42 U.S. Sec. 1983 and 1988 and pursuant to 28 U.S.C. Sec. 2254 as well as the First, Fourth, Fifth, Eighth, and Fourteenth Amendments of the United States Constitution. Jurisdiction is founded upon 28 U.S.C. Sec. 1331 and 1341(3) and (4) and the aforementioned Constitutional and Statutory provisions. Plaintiff, further invokes the pendant and jurisdiction of this court to hear and decide his claims arising out of state law.

PARTIES INVOLVED

(1) Plaintiff, at all times mentioned herein, was and is a citizen of the United States and a resident of the County of Kings, City and State of New York.

(2) At all times mentioned herein, the defendant, Legal Aid Society, 15 Park Row, New York, New York 10038, was and still is a division of and/or a municipal corporation agency and/or administrative agency operating, organized, and existing under and by virtue of the charter and lawful authority of said county.

(3) Defendants, PHILIP L. WEINSTEIN; JAMES BRANDEN, ESQ.; JOEL ATLAS, HILLARD WIESE, ESQ., upon information and belief, were and still are owners of and in possession and exclusive control of a certain

premises at the Legal Aid Society, 15 Park Row, New York, New York 10038.

(4) At all times mentioned herein, the defendants, LAW OFFICE, 527 Quincy Street, Brooklyn, New York 11221 and LAW OFFICE, 350 Broadway, New York, New York 10013, were and still are divisions of and/or independent corporation agencies, or municipal corporation agencies and/or administrative agencies operating, organized, and existing under and by virtue of the chapter and lawful authority of each said county, by MR. LEWIS and MR. FELDMAN, respectively.

(5) Defendant Artus at all times mentioned herein, was and still is in charge of said place of plaintiff confinement at Green Haven Correctional Facility, and in charge of its functions and in possession and exclusive control of certain premises and its authority or sentenced prisoners respectively; he functions in the capacity as the Facility Superintendent.

(6) Upon information and belief, each defendant herein were acting in their official capacity and/or each of them acted in the furtherance of their own interest and acting under color, to wit, under color of the statues ordinances, regulations, policies, customs usage of The United States Of America and the State Of New York. All defendants herein and out are sought to be sued in their individual capacity as well as sued in their official capacity respectively.

(7) Plaintiff, humbly urges this court to conduct investigations into the background of his complaint(s) and grant him a

counsel to assist him at each and every stage of proceeding, that the court may due consideration of his claim.

(8) Prior to the commencement of this action, the plaintiff had duly complied with all of the conditions precedent to the bringing of this action and complied with the provisions of the law. On or about the __ day of Nov., 1995, plaintiff filed a writ of error coranobias with the State Appellate Division thus exhausting his state action, which became final on the 18th day of March, 1996, and led to the commencement of this action, and

STATEMENT OF CLAIM AND
FACTUAL HISTORY

JAMES M. BRANDEN, an Attorney associated with PHILLIP L. WEINSTEIN, Esq., whom were assigned by order of the Appellate Division First Department date March 24, 1992, to represent the Plaintiff on his Appeal from a Judgment of the Supreme Court, New York County, under Indictment #338/91, rendered on February 13, 1992, convicting Plaintiff after a Jury Trial of Robbery in the First Degree [P.L. 160.15] and Robbery in the Second Degree [P.L. 160.10] and Sentencing thereon (Uviller, J. at Trial and Sentence). Plaintiff's state Appeal was denied by the App. Div. 1st. Dept., on 3rd day of Oct., 1995. (see Ex. (A) Enclosed herein).

Additionally, PHILLIP L. WEINSTEIN, Esq., was assigned to represent Plaintiff on his Appeal of a Judgment of the Supreme Court, Queens County, under Indictment #6542/89 rendered on __ day of Feb. 1993, convicting

Plaintiff after a Jury Trial of Robbery in Second Degree [P.L. Section 160.10] and Sentencing him thereon (Beerman, J., at Trial and Sentence) and PHILLIP L. WEINSTEIN, Esq., was assigned to represent Plaintiff on his Appeal of a Judgment of the Supreme Court, Queens County, under Indictment #2120/91 rendered on 6th day of June, 1992, upon an Alford Plea to Robbery in the Second Degree [P.L. Section 160.10], to run concurrent with Indictment #6542/89 (Beerman, J. at Sentence). Plaintiff's state Appeal was denied by the App. Div. 2d. Dept., on 12 day of June, 1995. The Motion for Leave to Appeal to the Court of Appeals was denied on 5th day of Jan., 1996 (see Ex. (A) Enclosed herein).

Plaintiff, also state(s) that the Defendant(s) were all made familiar with the proceedings in these case(s) and have supposely willfully neglected to examined the record below as to allege "informant" in question hereinout fully and carefully:

After the Wade Hearing but prior to Trial under Indictment #2120/91 (Queens County), Plaintiff Trial Counsel had received additional *ROSARIO* material. From one of the documents turned over, Trial Counsel learned that a Detective Jame Redmond #2970, the Arresting Officer of Plaintiff out of Queens County had allegingly spoken with a "so-called confidential informant", who allegingly happened to be represented by the Legal Aid Society at the time. Trial Counsel stated on record that upon information and belief, [he] believed [the Confidential Informant] was the source of the information which led to the Plaintiff being placed in lineup(s) and then ultimately, to arrest Plaintiff. In no material way were these facts investigated by the

Defendant(s) herein ever when Plaintiff brought to their attention that no confidential informant had existed as falsely claimed by the Detective Redmond #2970 during the Queens proceedings. (see Ex. (B) Enclosed herein).

Under these circumstances, it did not constitute a "conflict of interest" for Defendant JAMES M. BRANDEN, to represent Plaintiff on his Appeals in his case, and the fact that the Legal Aid moved to be relieved as Counsel on Plaintiff Appeals did violate Plaintiff Civil Rights and Due Process of Law.

Moreover, because the Defendant(s) JAMES M. BRANDEN, HILLIARD WIESE, JOEL ATLAS, ALDEN T. LEWIS and SAMUEL FELDMAN, Esq., intentionally failed to investigate the background of this alleged incriminating source supposely represented by the Legal Aid Society also led to Plaintiff not being represented under all of his Appeals by (right) by the Legal Aid Society (see, Exhibit (B) Enclosed herein). On or about May of 1993 violate Plaintiff Appellate right(s).

* * * * * * *

FOR A FIRST CAUSE OF ACTION, THE PLAINTIFF, SHERMAN WALKER, ALLEGES AS FOLLOWS:

Plaintiff notified the Defendant(s) Legal Aid Society respectfully of the lack of conflict on or about the year 1994, and requested that they move to correct the re-assignment of appellate counsel. The Defendant(s) never done anything (see Ex. (B) Enclosed herein).

Verified Complaint Dated April 10, 1996

Plaintiff, notified the Defendant(s) LEWIS and FELDMAN of the lack of conflict on or about the year 199(4)(5), and requested that they move to correct the re-assignment of appellate counsel for representation by Legal Aid Society. The Defendant(s) never done anything; instead the Defendant(s) Legal Aid Society neglected to investigate that no "conflict of interest" existed in any aspect of their representation, and deprived Plaintiff of his Constitutional rights and Due Process of the Law.

The neglect to search out that no actual conflict of interest existed disrupted the Defendant's Legal Aid Society professional duties to actions best suited to further Plaintiff's Appeals interests. By each Defendant's willful neglect into the background of the allege confidential informant existence, each Defendant became careless to exercise his independent professional judgment to aid Plaintiff Appellate process from the very beginning of the process.

Plaintiff, assert that his sworn affidavit from a Mr. Terrence proves that there never existed a conflict of interest. Mr. HEYWOOD, sworn that he never performed any informant work and denied ever informing against the Plaintiff in the past. Plaintiff, further state that Defendants were also negligent in not clearing this mishap up before the Court which granted Defendant motion to be relieved; had they done so they would have discovered a very important and relevant information that Detective JAMES REDMOND, had pre-fabricated the story of an alleged informant during the Queens Wade Hearing, thus, building a false version of a conflict of interest to alleging appear during WALKER'S Appeal stages (see Exhibit (C) attached herein).

Verified Complaint Dated April 10, 1996

PETITION FOR FEDERAL WRIT OF HABEAS CORPUS

That the illegal detention of WALKER reads as follows:

That under this part of WALKER complaint Walker contends that misrepresentation toward(s) correcting the alleged issue of a conflict of interest and in briefing, hearing and deciding of his Appeal violated his Right to Counsel and Due Process of Law.

WALKER, makes a Due Process claim for inconscionable Appellate delayed nominal misrepresentation resulted in a deprivation of a fundamental Constitutional Right.

Despite having advised the Chief Attorney in charge of Legal Aid Society of the Attorney JAMES BRANDEN delinquency at correcting the apparent misrepresentation, the remainder of the Appeal Legal Aid Society never moved to checked into their client information that shedded light on the non conflict of interest claim, nor removed BRANDEN and re-assigning new Appellate Counsel out of the firm to properly represent WALKER'S Appeal (i.e. their failure to due so denied him Right to Counsel on his Appeal). The two appoint 18-B Counsel should not have been assigned to WALKER'S case at all quite clearly, the Legal Aid Society did not exercise institutional vigilance in keeping track of its Attorney action(s) and work, blocked WALKER from receiving Legal Aid representation as noted under A.B.A. Code of Professional Responsibility, DR5-105 (A, C). Since Appellate's Appeal was actually heard, and since he was misrepresented by counsel's not assigned as of (right) on

his Appeal, the prejudice WALKER suffered from this neglect deprived him of a fundamental Constitutional Right to obtain a fair review of his convictions while properly represented by Legal Aid when initial assignment (see DR5-105(c))*

WALKER, argues he is nevertheless entitled to release, alternatively, a new Trial because this "delayed nominal" misrepresentation of his Appeal cannot cure the Per Se Due Process violation and resulting prejudice of his deprived Right to Counsel.

WALKER, also argue that the remedy of a new Appeal would be inappropriate and that he is entitled to unconditional release alternatively, a new Trial, because a new Appeal would in no fashion redress the deprivation of a fundamental Constitutional Right to be represented by Counsel as of (right) A.B.A. Code of Professional Responsibility, DR5-105(c). Specifically, his original Attorney Legal Aid was acting contrary to the Provisions of Disciplinary Rule DR5-105(c) and to the extent permitted under DR5-105(a).

PREJUDICE CRITERIA ASSERTED TO WARRANT FEDERAL HABEAS RELIEF OF UNCONDITIONAL RELEASE. 28 U.S.C.A. CONST. AMEND. 14, or NEW TRIAL

First, the length of the "delayed nominal" misrepresentation was clearly prejudice; WALKER, Appeal

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* WALKER, state that the failure to correct the deficiency of assigned Counsel Constitute State exhausted action as well.

was not routine and was not actually perfected within the required period of time by his original assigned Attorney as of right. Second, no acceptable reason for this misrepresentation can be justified as to why the alleged conflict of interest claim thoroughly existed; which the Legal Aid neglected to supervise it appointed Attorney(s) to monitor BRANDEN critical Legal steps taken in WALKER case. Third, WALKER assert that prejudice was felt because he did not waive his Right to Appeal and to be represented by his assigned Counsel as of right; instead WALKER repeated efforts to alert Legal Aid went in vain. Finally prejudice can be seen because of each Attorney 18-B appoint Counsel Poor quality and that poor quality undermined the outcome of the Appeal and that WALKER labored under a conflict of interest during these Counsel representation. In light of these circumstance, this neglect to correct the problem prejudiced WALKER to Due Process Right to a Speedy Appeal and to be represented by his Counsel as of right. Canon 9; A.B.A. Code of Professional Responsibility, DR5-105 (A, C).

(9) As a result of the Defendants "nominal misrepresentation, and neglection Plaintiff suffered serious physical and emotional injury, resulting in among other things, excruciating pain and humiliation for being ignored by the Defendant(s) whom deprived Plaintiff of a just opportunity to be adequately represented on his Appeal. Moreover, the lose of Plaintiff to be represented by his original assigned Appeal Attorney because of deliberate neglect Plaintiff suffered severe emotional distress.

Verified Complaint Dated April 10, 1996

(10) No previous motion of this kind have been made in the Supreme Court of New York and/or a Federal Court of the United States.

WHEREFORE, Plaintiff demand Judgment as follow pursuant to 42 U.S.C.A. Section 1983.

(1) On the first cause of action, Judgment in favor of Plaintiff SHERMAN WALKER, against Legal Aid Society ex rel., PHILLIP L. WEINSTEIN, JOEL ATLAS, JAMES M. BRANDEN, HILLARD WIESE, ALDEN T. LEWIS and SAMUEL FELDMAN; Defendant(s) respectively in the sum of $(8),000,000,000 compensatory damages and $(8),000,000,000 punitive damages;

(2) Declare that the practice of each defendant(s) in denying Plaintiff his Right to Counsel on his Appeal and violated him Due Process of Law secured under the Constitution.

• Federal Habeas Corpus relief pursuant to 28 U.S.C.A. Section 2254(a).

(1) That Appellate be relief from custody unconditionally or alternatively Order a newer Trial; Plaintiff – Appellant, demand his respective Judgment(s) together with cost and disbursements of thus action, and any different relief as to this Court seem just and proper before its eyes.

Verified Complaint Dated April 10, 1996

DATED: 10th day of April, 1996
County of _____

Respectfully Submitted,

s/ Walker, Sherman
Mr. Sherman Walker
Plaintiff – Appellant

Sworn to before me this
10th day of April 1996

s/ Rodrigo Blake 4/10/96
NOTARY PUBLIC

RODRIGO BLAKE
Notary Public, State of New York
No. 1-8689
Qualified in Manhattan County
Term Expires March 1, 1997

ORDER OF THE COURT OF APPEALS OF NEW YORK DENYING LEAVE TO APPEAL DATED DECEMBER 7, 1995

COURT OF APPEALS OF NEW YORK

[NO NUMBER IN ORIGINAL]

People, Resp. v. Walker (Sherman), App.

* * *

December 7, 1995

PRIOR HISTORY:
NY County; AD 1st; order October 3, 1995.

JUDGES: Smith, J.

OPINION: LEAVE TO APPEAL

Denied

ORDER OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT DATED, DECIDED AND ENTERED OCTOBER 3, 1995

SUPREME COURT OF NEW YORK,
APPELLATE DIVISION, FIRST DEPARTMENT

55664

The People of the State of New York,

Respondent,

v.

Sherman Walker,

Appellant.

* * *

October 3, 1995, Decided
October 3, 1995, ENTERED

* * *

JUDGES: Concur — Sullivan, J. P., Ellerin, Rubin, Kupferman and Asch, JJ.

OPINION: Judgment, Supreme Court, New York County (Rena Uviller, J.), rendered February 13, 1992, convicting defendant, after a jury trial, of robbery in the first and second degrees, and sentencing him, as a second felony offender, to concurrent terms of 12 1/2 to 25 years and 7 1/2 to 15 years, respectively, unanimously affirmed.

The voucher for defendant's eyeglasses taken from him at the time of his arrest, which voucher was not turned over to the defense until the middle of trial, did not constitute *Rosario* material (*People v Rosario*, 9 NY2d 286, *cert denied* 368 US 866; CPL 240.45[1][a]) with respect to Detective Mullin's testimony, since it did not contain any statements or descriptions of the events or participants in the incident, was not completed by that detective, and the item vouchered did not relate to the detective's direct testimony (*see, People v Miranda*, 192 AD2d 352, 354). Although it is also questionable whether or not the voucher related to the testimony of Detective Favilla who prepared the document, the voucher was turned over to the defense prior to his testimony and the sanction imposed by the trial court, striking certain testimony and precluding the prosecutor from questioning Favilla with respect to the voucher, cured any prejudice caused by any violation of the *Rosario* rule (*see, People v Ranghelle*, 69 NY2d 56, 63; *cf., People v Jarrells*, 190 AD2d 120). Defendant's *pro se* contention that the failure to timely turn over two detective's reports (DD5's) also constituted a violation of the *Rosario* and *Brady* rules (*Brady v Maryland*, 373 US 83) is similarly without merit since the detective who prepared the documents did not testify at trial (CPL 240.45[1][a]) and since the information contained therein did not tend to exculpate him or affect the credibility of a witness who testified at trial.

It was not an improvident exercise of discretion for the trial court to have denied the defense application to relieve counsel prior to and during the pretrial suppression hearing nor was good cause demonstrated requiring a hearing on the matter (*see, People v Smith*, 192 AD2d 310, *affd* 82 NY2d

731; *People v Newell*, 200 AD2d 451). In light of the conclusory assertions proffered in support of the application and the fact that the case had been pending before the trial court for several months, "the court had a clear picture of the 'nature of the disagreement' between defendant and counsel and its 'potential for resolution' ", and was therefore in the best position to determine the merit of the application (*People v Smith, supra*, at 312, quoting *People v Sides*, 75 NY2d 822, 825). The fact that the court granted counsel's ex parte application for the same relief at the conclusion of the hearing, based on his assertion that defendant had threatened him, in no way indicated that counsel's representation of defendant during the hearing was compromised by any alleged threats. The record reveals that the dissolution of the attorney/client relationship based on defendant's actions occurred after the hearing was completed.

Defendant's additional *pro se* contention that he was also deprived of the effective assistance of trial counsel may not be reviewed on appeal since he relies on facts dehors the record (CPL 440.10; *see, People v Brown*, 45 NY2d 852, 853-854).

We have considered defendant's remaining contentions including that raised in his *pro se* supplemental brief, and find them to be without merit.

Concur — Sullivan, J. P., Ellerin, Rubin, Kupferman and Asch, JJ.

CERTIFICATE OF THE STATE OF NEW YORK, COURT OF APPEALS DISMISSING APPLICATION DATED JANUARY 5, 1996

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. GEORGE BUNDY SMITH,
Associate Judge

Ind. No. 6542/89
2120/91

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

SHERMAN WALKER,

Appellant.

I, GEORGE BUNDY SMITH, Associate Judge of the Court of Appeals of the State of New York, certify that the application by the defendant-appellant for a certificate to appeal pursuant to Section 460.20 of the Criminal Procedure Law is dismissed because application for the same relief has already been made to and denied by order of the Appellate Division dated October 3, 1995 (CPL Section 460.20; *People* v. *McCarthy*, 250 NY 358, 361).*

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* Description of Order: Order of the Appellate Division, Second Department, dated June 12, 1995, affirming a judgment of Supreme Court, Queens County, rendered February 27, 1992.

Certificate Dismissing Application

Dated: Albany, New York
January 5, 1996

s/ George Bundy Smith
Associate Judge

CERTIFICATE OF THE STATE OF NEW YORK, COURT OF APPEALS DISMISSING APPLICATION FOR RECONSIDERATION OF APPEAL DATED JANUARY 5, 1996

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. GEORGE BUNDY SMITH,
Associate Judge

Ind. No. 2120/91

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

SHERMAN WALKER,

Appellant.

I, GEORGE BUNDY SMITH, Associate Judge of the Court of Appeals of the State of New York, certify that the application by the defendant-appellant for a certificate to appeal pursuant to §460.20 of the Criminal Procedure Law is dismissed because the order* sought to be appealed is not appealable under Criminal Procedure Law, §450.90(1).

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* Description of Order: Order of the Appellate Division, Second Department, dated October 3, 1995, denying defendant's motion for reconsideration of an appeal determined by order of the Appellate Division dated June 12, 1995, affirming a judgment of Supreme Court, Queens County, rendered February 27, 1992 or for leave to appeal to the Court of Appeals.

Certificate Dismissing Application re Appeal

Dated: Albany, New York
January 5, 1996

s/ George Bundy Smith
Associate Judge

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT ON MOTION DATED OCTOBER 3, 1995

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION :
SECOND JUDICIAL DEPARTMENT

VINCENT R. BALLETTA, JR., J.P.
CORNELIUS J. O'BRIEN
WILLIAM C. THOMPSON
DAVID S. RITTER, JJ.

92-04929

The People, etc.,

respondent,

v

Sherman Walker,

appellant.

(Ind. No. 2120/91)

DECISION & ORDER ON MOTION

Motion by the appellant for reargument of an appeal from a judgment of the Supreme Court, Queens County, rendered June 16, 1992, which was determined by decision and order of this court dated June 12, 1995, or, in the alternative, for

leave to appeal to the Court of Appeals from the decision and order of this court, or, in the further alternative, for an enlargement of time to file a brief in support of the motion.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

BALLETTA, J.P., O'BRIEN, THOMPSON and RITTER, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

October 3, 1995

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT, NO. 92-01662 DATED JUNE 12, 1995

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION :
SECOND JUDICIAL DEPARTMENT

VINCENT R. BALLETTA, JR., J.P.
CORNELIUS J. O'BRIEN
WILLIAM C. THOMPSON
DAVID S. RITTER, JJ.

92-01662

The People, etc.,

respondent,

v

Sherman Walker,

appellant.

(Ind. No. 6542/89)

Submitted — February 2, 1995

DECISION & ORDER

* * *

Decision and Order, No. 92-01662, Dated June 12, 1995

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Beerman, J.), rendered February 27, 1992, convicting him of robbery in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The trial court properly ruled that the defendant's arrest photograph was admissible on redirect examination in response to the defendant's lengthy inquiry into the complaining witness's recall of the robber's identifying characteristics. The photograph confirmed the complainant's testimony that the robber was wearing a dark grey jacket at the time of the attack (*see, People v Dent*, 183 AD2d 723; *People v Santana*, 162 AD2d 191; *People v Rios*, 156 AD2d 397).

The failure of the complaining witness to inform the detective in an unrelated criminal investigation that the defendant, who he picked out of a lineup and whose photograph he picked out of a photo array, had also been his assailant in the present crime, did not constitute exculpatory evidence, since there is no indication that the complainant was ever questioned concerning the instant offense. Therefore, evidence of the "fact" in question was not *Brady* material which the People were obliged to turn over to the defense.

The defendant's sentence was not excessive (*see, People v Suitte*, 90 AD2d 80).

Decision and Order, No. 92-01662, Dated June 12, 1995

We have considered the defendant's remaining contentions, including those raised in his supplemental *pro se* brief, and find them to be without merit.

BALLETTA, J.P., O'BRIEN, THOMPSON and RITTER, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

June 12, 1995

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT, NO. 92-04929 DATED JUNE 12, 1995

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION :
SECOND JUDICIAL DEPARTMENT

VINCENT R. BALLETTA, JR., J.P.
CORNELIUS J. O'BRIEN
WILLIAM C. THOMPSON
DAVID S. RITTER, JJ.

92-04929

The People, etc.,

respondent,

v

Sherman Walker,

appellant.

(Ind. No. 2120/91)

Submitted — February 2, 1995

DECISION & ORDER

* * *

Decision and Order, No. 92-04929, Dated June 12, 1995

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Beerman, J.), rendered June 16, 1992, convicting him of robbery in the first degree, upon his plea of guilty, and imposing sentence.

ORDERED that the judgment is affirmed.

Contrary to the defendant's contention, the record demonstrates that the People did not fail to turn over the *Rosario* material in question *(see, People v Johnson*, 155 AD2d 339).

Prior to executing an order to remove the defendant from jail and place the defendant in a lineup, the People were under no obligation to first attempt to contact the assigned attorney who had represented the defendant in an unrelated criminal matter (*cf., People v Coates*, 74 NY2d 244, 249). In any event, we note that the defendant was represented at the lineup by an attorney who had been appointed for him by the Queens County Supreme Court. Furthermore, the record does not support the defendant's contention that the lineup was unduly suggestive (*cf., People v Bady*, 202 AD2d 440).

The defendant's contention that his sentence was excessive is without merit *(see, People v Suitte*, 90 AD2d 80).

The defendant's remaining contentions, including those raised in his supplemental *pro se* brief, are without merit.

Decision and Order, No. 92-04929, Dated June 12, 1995

BALLETTA, J.P., O'BRIEN, THOMPSON and RITTER, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

June 12, 1995

SUPPLEMENT FOR APPELLANT WITH ATTACHED EXHIBITS FILED IN THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

To be argued by
ALDEN T. LEWIS, Esq.
(20 Minutes)

Supreme Court of the State of New York
Appellate Division: Second Department

Case No.:
92-01662
92-02880
92-04929
(Heard on the original record)
Ind. No.:
6542/89
2119/91
2120/91

The People of the State of New York,

Respondent,

vs.

SHERMAN WALKER,

Appellant,

SUPPLEMENT FOR APPELLANT

* * *

Supplement for Appellant with Attached Exhibits

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Case No.:
92-01662
92-02880
92-04929
(Heard on the original record)

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

SHERMAN WALKER,

Appellant.

PRELIMINARY STATEMENT

This is a supplemental brief submitted in further support of appellant's appeal from a judgment of convictions of the Supreme Court, Queens County, rendered after trial, (Beerman, J.), on Jan. 30, 1992 and sentence to seven to fourteen years imprisonment under IND. NO.: 6542#89; on 6th day of June, 1992, appellant was illegally sentenced under IND. NO. 2120#91 (Beerman, J.) to seven to fourteen years to run concurrent with respect to indictment 6542/89; appellant was also sentenced after a jury trial of Robbery in the Third degree, on 9th day of April, 1992, before Acting Justice (Hon. Beerman) to three and a half to seven years to run consecutively with the above imposed convictions.

Supplement for Appellant with Attached Exhibits

This Court granted appellant permission to file a supplemental brief in connection with appellant Counsel main brief on 24th day of April, 1994.

Appellant is incarcerated pursuant to the above judgment of convictions.

STATEMENT OF FACTS[1]

Procedural History

An application was made by the District Attorney Office of Queens County, proceeded by Order to Show Cause without proper notice to appellant then retained Counsel for an order compelling the appellant to stand in lineups (*see*, appellant Exhibit (A) attached hereto).

Prior to the issuance of the order, the appellant was incarcerated on an unrelated charge; also appellant was tentatively identified by photographs on Jan. 15, 24, 25, 1991, as the person who was alleged to have forcibly taken property from people known to Detective Redmond sh#2970 (Hr.1: 6-13);

Since appellant was alleged to have been a suspect in the crimes the people allowed various alleged witness(es) who presumably had tentatively identified appellant photograph to view him in the lineups that were held adequate probable cause.

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1. Transcript Pages preceded by a (Hr.1.:) refer to the pages of the Wade transcripts of Dec. 2, 1991; the transcript pages preceded by a (Hr.2.:) refer to pages of the Wade held Dec. 3, 1991, [Cover indicates 12/6/91].

Supplement for Appellant with Attached Exhibits

On March 27, 1991, on or about 1:15 P.M., in the B'klyn House of Detention the appellant was involuntarily transported to the 109 Pct., to participate in lineups in Queens County. Upon arriving at the Precinct appellant request for Counsel retained was denied (Hr.2.: 14, 15, 50-60). Instead, a Court appointed 18B attorney was improperly allowed to represent appellant and another individual that during the lineup proceeding, based upon which appellant was selected out of five lineups.[2]

The District Attorney Office was aware that retained Counsel was representing appellant in a case actually pending on the same date the lineups were conducted. This pending case was in Part k-9 the Supreme Court County of Queens under Indictment 6542#89. They were also aware that retained Counsel had represented appellant in a case pending in New York County under IND. NO. 338#91 and Kings County under IND. NO. 410#91.[3] In spite of this knowledge the District Attorney Office failed to "notify" retained Counsel that an order to show cause had been made on March 22, 1991. (*See*, appellant Exhibit (B) attached hereto).

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2. The five indictment appellant was initially charged with the Court dismissed three of the remaining indictment for lack of speedy trial.

3. (Hr.1.: 34-40) show Det. Redmond awareness of appellate unrelated charges when he communicated with other Detectives who had arrested appellant on separate charges before the Queens lineup(s).

Supplement for Appellant with Attached Exhibits

Appellant Contentions:

That the lineup-order was improper in that appellant counsel was not presented with any facts which might establish a basis for appellant being placed in lineup(s). Without such a basis SERVED on appellant Counsel appellant was improperly seized and any subsequent lineups, should have been suppressed; (2) and that the order to show cause setting forth specifics as to the connections of the complainants and witness(es) was absence a showing of probable cause to arrest appellant for each separate crime (See, Exhibit (B), supra).

Wade Hearings[4]

Proceedings of Dec. 2, 3, 1991; Feb. 1, 11, 1992.

The first Wade hearing started and was finished under indictment number 2119#91 on Dec. 2, 1991; the second Wade hearing preceded on Dec. 3, 1991 til Feb. 10, 11, 1992, respectively.

DETECTIVE JAME REDMOND, was the only witness called by the Prosecutor. He testified that he was a detective since 1980 and that he was in charge of the investigation under both indictments. He also stated that he obtained photographs of appellant and others he took them to the witness(es) for viewing on Jan. of 1991. Redmond was in charge of conducting seven illegal lineups against appellant.

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4. At this level the facts pertains to both lineup cases for expedient purposes for this Court and to avoid repetition.

Supplement for Appellant with Attached Exhibits

As a result the official made insufficient effort to contact appellant retained Counsel (Hr.2.: 90); and that the lower Court improperly ruled as a matter of fairness that there was no need to consolidate the "Hearings" as to all of the indictments (Hr. 1.: 75-80).

Right to Counsel attached

In this case the right to Counsel had attached by virtue of the issuance of the Court ordered lineups and a plain reading of the record it becomes clearly that appellant right to Counsel was unfairly blocked.

Appellant Contentions:

That the officials conducting the lineups caused appellant to suffer the denial of his retained Counsel for failure to notify said Counsel of the impending lineups.

Defense

Appellate Counsel presented no evidence.

The Decision on the Hearing Court

In two consecutive decision (Justice Beerman) denied appellant's motion to suppress the identification testimony under indictment 2119#91 and 2120#91.

Supplement for Appellant with Attached Exhibits

Sentence under Ind. No.: 2120#91[5]

The Court denied appellant's application to withdraw his tainted Alford plea was an abuse of discretion (S.1.:).

SUPPLEMENTAL ARGUMENT

POINT I

APPELLANT CONVICTION MUST BE REVERSED ON THE GROUND THAT APPELLANT WAS SUBJECTED TO UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF APPELLANT RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS (N.Y. CONST., ART. I SEC.12; U.S. CONST., 4th and 14th Amdt.).

The issue presented today before this Honorable Court is indeed a noble one which demands the application of the N.Y. CONST., ART. I SEC. 12; U.S. CONST., 4th and 14th Amdt., which shall cure the violation unreasonably committed against appellant.

Going right to the problem, which is like the problem corrected in the Matter of *Santucci* vs. *Andrew*, 117 Misc. 2d 616, 458 N.Y.S.2d 1007 – at p. *1008* (Sup. 1983) where Justice Cornelius O'Brien, held that a prospective defendant, subjected to be viewed in a lineup by witness(es) to an alleged crime, he may not be viewed by witness(es) to other crimes in connection with which he may be a suspect, absent a showing of probable cause to arrest him for each crime.

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5. Transcript pages preceded by a (S.1.:) refer to the pages of the Sentencing Minutes of June 6th 1992 [cover indicates 6/ /92].

Supplement for Appellant with Attached Exhibits

In the case at bar, the People's Order to Show Cause was devoid as to setting forth specifics as to who were to view the prespective appellant and their connection to the events surrounding the alleged crime, therefore, an order should not have been signed to effectuate the lineup(s) proceeding in that it was absence a showing of probable cause to arrest the appellant for each separate crime. Applying, that same analysis, here, as applied in *Santucci* vs. *Andrew*, the application of the people should have been denied. Moreover, the detention of appellant in order that he be made to participate in a lineup to be viewed by witness(es) who had allegingly photographically identified him as the individual who committed the allege crime was improper in that it constituted a seizure without adequate basis. *See*, *e.g.*, *Santucci* vs. *Felix Logoa*, 117 Misc. 2d 500, 458 N.Y.S.2d 1009 at p. 1010 (Sup. 1983); *see*, *also*, *Alphonso C.* vs. *Morgethau*, 50 A.D.2d 97, 376 N.Y.S. 2d 126, at p. 128 (1st. Dept. 1975) where the Appellate Division First Department deciding the exact same issue before this Court denied the District Attorney Office application for a Want of Power. There that Court also took note that that type of seizure based on inadequate basis was not permitted. *Cf.*, the *Matter of Mackerl* vs. *Palermo*, 59 Misc.2d 750 at p. 765, 300 N.Y.S.2d 459 at p. 464 (Sup. Ct. 1969).

In the same vein, in *People* vs. *McClain*, 88 Misc.2d 693, 389 N.Y.S.2d 976 Justice Julius H. discussed the purpose behind these stringent requirement. In Justice Julius opinion he held that a suspect incarcerated on an unrelated charge cannot be made to stand in a lineup unless he/ or she have been given proper "Notice" in an application spelling out Probable Cause for granting of the relief sought.

Supplement for Appellant with Attached Exhibits

See e.g., Matter of Walter Pidgeon v. *Rubin*, 80 A.D.2d 568, 435 N.Y.S.2d 763 at p. __, (1982).

Relying also on the principles stated in *Kirby* v. *Illinosis*, 406 U.S. 682 at p. 688, 92 S.Ct. 411 (1972), where the U.S. Supreme Court ruled after the accused has been formally charged by indictment, information or complaint, his Sixth and Fourteenth amendment right to Counsel will have attached, and a lineup conducted without notice to and in absence of Counsel will be held to violate that right. The Supreme Court further held that the "target" of an application is entitled to "Notice" and the opportunity to be heard on the all-important issue of Probable Cause and that an accused is entitled to Counsel to assist him in his opposition, in what by its very nature is an "adversary judicial proceeding." *Kirby*, supra, at 1881, 92 S.Ct. 1872.

In sum, where a lineup identification followed an individual's illegal arrest, the evidence of that tainted identification must be suppressed. Cf., *People* v. *Dodt*, 61 N.Y.2d 408 at p. __, 474 N.Y.S.2d 441 (1984) (lineup); accord *People* v. *Young*, 55 N.Y.2d 419 at p. 430-1, 449 N.Y.S.2d 701 (1982). Appellant further contends that the above authority and supported rationale controls the problem in the case at bar, therefore, the lineup testimony by the prosecution witness under indictment 2119#91 should be suppressed in accordance with all identification evidence under IND. NO. 2120#91 in absent of adequate notice to appellant (then) retained Counsel of the pending lineups and a lack of Probable Cause to arrest appellant for each separate charge.

Supplement for Appellant with Attached Exhibits

Based on the foregoing, the Judgments must be set-aside and a new trial declared, as well as IND. NO.: 6542#89 in the interest of justice.

POINT II

APPELLANT WAS ENTITLED TO COUNSEL AT ALL CRITICAL STAGES OF THE CRIMINAL PROSECUTION, WHICH ATTACHED WHEN LINEUP ORDER WAS FILED (U.S.C.A. Const. Amends. 5, 6 and 14; Const. art. I Sec. 6.).

It is firmly established in our jurisprudence that an accused is entitled to Counsel at all critical stages of the criminal proceeding *see, e.g., People* v. *Settle*, 46 N.Y.2d 154, 165, 412 N.Y.S.2d 874, 880, 385 N.E.2d 612, 617 (1978). The right to Counsel attaches of course, once the criminal action has been commenced. *See, e.g. People* vs. *Blake*, 35 N.Y.2d 331, 339-340, 361 N.Y.S.2d 881, 890-891, 320 N.E.2d 625, 631-632. But it may also attached at an earlier activity. For instance, a Court order permitting the Police to bring the defendant to the scene of the crime, *see People* v. *Sugden*, 35 N.Y.2d 453, at p. 461, 363 N.Y.S.2d 923, at p. 929, 323 N.E.2d 169, at p. 173, or directing that an accused appear in a lineup, *see*, also *People* v. *Coleman*, 43 N.Y.2d 222, 401 N.Y.S.2d 57, 371 N.E.2d 819 are sufficient to trigger the right to Counsel even though the criminal action may not have commenced.

Thus in this case, appellant's right to Counsel attached when the order to show cause was filed for future lineups entitling appellant to the services of his retained Counsel

accord *Blake*, supra, 35 N.Y.2d 331 at 339; *People* v. *Sugden*, 35 N.Y.2d 453, at p. 461, which address the legal error committed against appellant. Appellant case is also similar to *People* v. *Coleman* (supra), *Coleman* had been placed in Court ordered lineups without the right to his Counsel. The Court of Appeal had later corrected this similar error by holding that the right to Counsel had "indelibly attached". Here, violation greater than *Coleman* existed.

The appellant argue that *Blake*, *Settle*, and *Coleman* control his case because the issuance of the arrest warrant in connection with the order to show cause commencing the criminal action which the appellant were suppose to answer in Court and once a matter is the subject of a legal controversy any discussion relating thereto should be conducted by an accused Counsel: at that point Counsel is in a position to safeguard his client's right. Credit *Settles*, supra, at p. 163-164, 46 N.Y.2d __. Appellant argues on that his Counsel position were known to the law enforcement in Queens and that the insufficient explained delayed which prevented appellant the services of his Counsel. In this case the right to Counsel was deliberately block, the breach of which said lineup(s) should result in exclusion.

Accordingly, the lineup evidence under IND. NO. 2119#91 and 2120#91 should now be suppressed and new Trials declared as well as IND. 6542#89 in the interest of justice.

Supplement for Appellant with Attached Exhibits

POINT III

APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHICH THE RESULTING CONVICTION ARE THUS CONSTITUTIONALLY DEFECTIVE AND MUST BE REVERSED

Both the Federal and New York State Constitutions guaranty to the defendant in a criminal proceeding the right to the assistance of competent legal Counsel to assist in his defense. U.S. Const., Amdt. 6, N.Y. Const., Art. 1 Sec. 6. The Court have elucidated this requirement to interpret the mere presence of Counsel as being insufficient compliance with the Constitutional guarantees, and have instead required that a criminal defendant be afforded Counsel who provides effect-assistance. *McMann* v. *Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). The performance of trial Counsel may be evaluated by the appellate courts to ensure that Counsel has not failed to render adequate, reasonably effective legal assistance. *Cuyler* v. *Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Analysis of the alleged deprivation of his right is based on the Constitution as defined in the Sixth Amendment. *Powell* v. *Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Johnson* v. *Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

The ideals to be applied in assessing the trial performance of a defendant's Counsel have been set forth by the Supreme Court in the Opinion of the Court by Justice O'Conner in the case of *Strickland* v. *Washington*, 466 U.S.

668, 104 S.Ct. 2052, 80 L.Ed.2d 764 (1984). It was the intention of the Court to describe the standards of judging the contention that a conviction must be overturned because of actual prejudice by way of ineffective assistance of Counsel. Id., at 2063. The *Strickland* opinion provide little specific guidance or litmus test of the trial Counsel's adequacy, but while deferring to the individual attorney's decisions of strategy and manner of providing assistance, the Court made clear that the purpose of such analysis is not to examine with hind-sight whether a particular act or omission was unreasonable, but to simply ensure that the defendant received a fair trial. The *Strickland* holding requires that for reversal to be required, it must be shown that the trial Counsel's assistance must have been "deficient . . . [with] errors so serious that Counsel was not functioning as the "Counsel" guaranteed . . . by the Sixth Amendment [and that] the deficient performance prejudiced the defense . . . [i.e.,] that Counsel's errors were so serious as to deprive the defendant of a fair trial . . . whose result is unreliable. Id., at 687. The *Strickland* opinion simply requires a showing that Counsel's representation fell below an objective standard of reasonableness.

In New York, the standard for questions of ineffective representation derive from the opinion of the Court of Appeals in *People* v. *Baldi*, 54 N.Y.2d 137, 444 N.Y.S.2d 893, 429 N.E.2d 400 (1981). Even though this decision predates the *Strickland* opinion, the broader protection offered by this decision remain the law in New York.

The Court of Appeals has varied little from this standard, and has continued to assert that hindsight will not benefit an

analysis of Counsel's performance. However, it has been held that such a claim may rest on something other than a specific trial strategy, additional, Counsel unreasonable performance may rest on the cumulative errors of Counsel. *See, e.g. People* v. *Glen W.*, 89 A.D.2d 883, 453 N.Y.S.2d 217 (1982).

A Contention of ineffective assistance — of trial Counsel require proof of less than meaningful representation, rather than simple disagreement with strategies and tactics (*see People* v. *Benn*, 68 N.Y.2d 941; also *People* v. *Rivera*, 71 N.Y.2d 705 at 708 (1988).

While it must be acknowledge that the record of proceedings below presents glaring error of commission or omission by the defense Counsel and events which caused the proceeding and the trial(s) to be a sham, when taken as a whole, the appellant attorney's performance did not provide appellant with the effective, professional assistance to which appellant was entitled.

The *Strickland* Court requires a defendant to show that the resulting conviction was unreliable and unfair, as a result of the errors of trial Counsel. *Strickland*, supra, 8 L.Ed.2d 674, at 687. In describing the scrutiny against which Counsel's performance will be judged, the *Strickland* Court has endorsed the requirement of "reasonable effective assistance" which the Second Circuit has adopted and describe as requiring "that the quality of defense Counsel's representation should be within the range of competence reasonably expected of attorneys in criminal cases". In *Trapnell* v. *United States*, 725 F.2d 1419, (2d. Cir. 1983) this Court has recognized that adequate preparation for trial

often may be a more important element in the effective assistance of Counsel to which a defendant is entitled that the forensic skill exhibit in the Court room. *Stubbs* v. *Thomas*, 590 F.Supp. 94 (S.D.N.Y. 1984). The *Stubbs* Court went so far as to examine the performance of the investigator who was assigned to discover information for the defense, and held that even a deficient performance by the investigator could constitute a deprivation of the defendant Sixth Amendment rights. Id., 100.

The *Baldi*, supra, at 146-147 recognized exceptions to requiring to show that the trial result would have been different when, for example, "Counsel cumulative errors failed to subject the prosecution's case to meaningful adversarial testing" . . . Here, appellant Counsel's behavior and conduct of his duties as effective Counsel was insufficient to meet the *Strickland*, *Baldi* (or any) standard of reasonable, competent professional advocacy.

The appellant will now address the *Strickland* and the test of *Baldi* that is required to warrant a reversal of his conviction(s) due to ineffective assistance appellant trial Counsel conduct at various levels.

A. The Strickland and Baldi Test:

Ineffective Representation

This Court will find that numerous instances establish appellant trial Counsel lack of effective assistance.

To begin with, appellant will first demonstrate Counsel fatal errors under Indictment 6542#89.

Supplement for Appellant with Attached Exhibits

Sandoval Proceeding[1]

(1). Appellant and Counsel had a lack of communication which violated appellant due process based on a lack of communication (SP.: 3, 4, 5, 6, 7, 8, 9).

Jury Selection

(2). At a point during Jury Selection one of the perspective juror (Ms. Krinsky) rendered an objection as to her ability to be an impartial juror for the trial (JS.: 11, 12-19). Some time later the Court, the Assistant District Attorney in the presence of appellant trial Counsel had probed this perspective juror and another unknown juror about their express concern being a member of the Jury Panel (JS.: 40-63). Appellant argues that it was, here, Counsel violated his due process when Counsel failed to object to the Court probing of the perspective juror(s) outside the presence of his client.

(3). During the use of the defense peremptory challenges; Counsel, the Court and the trial prosecutor inside the Court chambers, outside the presence of appellant, conducted the peremptory proceedings. Here, appellant argue that his Counsel failure to render an objection denied him full participation of the selection of his Jury Panel and to be present at every material stage of the trial (J.S.: 13-63-67). Appellant, assert that Counsel should have known that

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1. Transcript pages preceded by "SP." refer to pages of Sandoval minutes [cover dated 1/21, 22, 1992; pages preceded by JS. refer to pages of the Jury Selection [cover page dated 1/23/92].

appellant had an absolute right to participate in the use of his peremptory challenge and that his Counsel failure to respect that right is sharp evidence of his Counsel deficiency.

Trial[2]

(1). Counsel failure to adequately intertwine the opening and closing statements with the facts of the case obstructed the mold, the fair proceeding and process at appellant trial (Tr.: 14-17) (Tr.: 317-349), defense Counsel failed to illuminate the facts of the defense witness Danchak to the jury adds to Counsel errors.

(2). During trial appellant consulted with Counsel to call Police Officer *Danchak* to the stand for his defense based upon which he did, however, Counsel chose not to introduce this defense witness officer *Danchak* grand jury minutes at trial that would have proven officer *Danchak* vehicle was positioned in the "exact" same location on Archer Avenue as Police Officer *Faya* the alleged arresting officer, clearly, contradicted *Faya* testimony. Instead, Counsel allowed the defense witness to commit perjury, nor would he impeach this to correct his false testimony (Tr.: 239-246). Appellant stresses that *Faya* and Officer's *Danchak* testimony was under oath and directly contradicted each other testimony, and that if it had been made plainly available to the jury by Counsel the verdict might well have been different. Counsel failure here was intentional which is sharp evidence of Counsel deficiency.

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2. Transcript pages preceded by "Tr." refer to page of trial minutes [cover dated 1/27, 28, 29, 30, 1992].

Supplement for Appellant with Attached Exhibits

(3). Appellant, further argues that Faya and Danchak's inconsistent arrest testimony furnished proof of an essential element of misidentification; the two issues are inextricably intertwined: if Faya lied about arresting appellant and that Danchak changed his testimony about the arrest, then there exist no proof that either witness Farajian or Kashani bore the requisite independent source at the time of the alleged show-up identification. Appellant frames the issue in this wise: is a prosecutor relieved of his legal and ethical obligation to correct testimony he and defense Counsel knew to be false whenever defense Counsel inexcusably fails to correct the error himself? Appellant stresses that under the circumstances an unfair trial occurred irrespective of who is to blame for it.* Counsel failure here was intentional which is sharp evidence of Counsel deficiency, and/or prejudice.

Moreover, appellant argues that Counsel was ineffective for failure to object to portions of the Court charge with respect to the charge on "identification and resisting arrest without proper instructions to the jury and/or dismissing the indictment before submission to the jury, because the jury may have reasonably concluded that the resisting arresting was conclusive or that the burden of proof shifted to the defendant (Tr.: 382-412). Considering the case and the charge as a whole Counsel should have moved for limiting instructions of Danchak testimony since it related to the elements of the witness(es) identification and that of the fifth element of resisting arrest in. This error renders Counsel actions meaningless.

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* Appellant also submit that the Prosecutor should not be absolved for misleading the jury and the judge (*see*, Grand Jury Min. in support hereof).

Supplement for Appellant with Attached Exhibits

Wade Hearing under IND. No. 2119#91, 2120#91

(1). Counsel failure to call attorney Robert Schwartz who incorrectly represented appellant and another individual on the same day at the lineup(s) hampered appellant right to present factual evidence at the pre-trial hearing to expose any possible suggestivibility which may have been observed by Mr. Schwartz while attending the lineups.

(2). Counsel failed to make out an order to produce the alleged informant for a Darden inquiry on the ground that there were a rational basis to reject Detective Redmond testimony of the alleged informant. (See appellant Exhibit (C) attached thereto in support hereto of).* This error by Counsel is sharp evidence of Counsel deficiency and/or result in prejudice.

Sentences

(1). Appellant will now lists the things Counsel did not do under IND. NO.: 6542/89, 2119#91 and 2120#91 that renders Counsel ineffective:

(2). As to IND. NO. *2120#91*, Counsel made no effort to alert the Court that appellant had a right to withdraw the tainted Alford Plea in that the Court illegal sentenced appellant in connection with a "Count" of the indictment which had been earlier dismissed (i.e. the first Count Robbery in first degree) by the Court and never resubmitted to the Court by the People.

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* See Counsel main brief for Exhibit (C).

Supplement for Appellant with Attached Exhibits

(3). As to IND. NO.: *6542#89, 2119#91 and 2120#91*, Counsel made no valid enough effort to challenge the Constitutionality of appellant previous convictions at either sentence proves Counsel had a lack of interest to present meaningful evidence in his client behalf. *See*, C.P.L. 400.21; *People* v. *Chestnut*, 188 A.D.2d 480.

(4). As to IND. NO.: *2120#91*, appellant further stresses that his right to Counsel was adversely affected when his attorney, either voluntary or at the Court's urging, became a witness against appellant. When the Court deemed it necessary to obtain factual information from Counsel during appellant application to withdraw his plea, the Court should have assigned the appellant different Counsel before doing so. Moreover, once Counsel took a position adverse to appellant, the Court should not have proceeded to determine appellant oral application to withdraw without first assigning the appellant new Counsel in light of the misrepresentation and/or conflict of interest between appellant and Counsel. *See, e.g. People* v. *Satana*, 156 A.D.2d 736, 550 N.Y.S.2d 356 at 358 (controlling).

(5). As to IND. NO. *6542#89, 2119#91* respectively, Counsel made no investigation of obtaining testimony from appellant relatives, friends etc.. For instant, Counsel failed to use statements from appellant Mother or Wife whom were present and willing to testify in appellant's behalf that appellant was not a violent person, but devoted to his family. If Counsel would had used this testimony to humanize appellant, thus counteracted the bad impression of appellant before the Court by presenting some other favorable mitigating circumstances there is a significant chance that appellant would have been given a much lesser sentence.

Supplement for Appellant with Attached Exhibits

In view of the above possibilities, conjoined with the unreasonableness and meaningless of Counsel's cumulative failure(s) are more than sufficient to establish a violation overall. In sum, it must be concluded that appellant conviction(s) must be vacated and new trial(s) declared.

CONCLUSION

BECAUSE OF THIS DEPRIVATION OF APPELLATE CONSTITUTIONAL RIGHTS, THE CONVICTIONS MUST BE REVERSED FOR NEW TRIALS.

s/ Walker, Sherman
SHERMAN WALKER
92A7141 II Appellant
Pro-Se
Elmira CORR. FAC.
Elmira, NY 14902-0500

Supplement for Appellant with Attached Exhibits

EXHIBIT A

SP 0068-91 **PART AA-2**

SUPREME COURT
QUEENS COUNTY
CRIMINAL TERM

The People, etc.,
vs

Defendant
IMO
SHERMAN WALKER

* * *

ATTY.
s/ Robert Schwartz 18B

Adjournments

PART	DATE	REMARKS	PART
AA2	5-22-91	O.S.C. (LINE-UP)	GRAND

Supplement for Appellant with Attached Exhibits

IND. NO. SP0068/91

PEOPLE OF THE STATE OF NEW YORK

vs.

I.M.O.
SHERMAN WALKER

JUDGE VINCENT F. NARO
PART AA2 DATE 3/22/91

NATURE OF PROCEEDING: O.S.C. LINE-UP

* * *

APPEARANCES:

* * *

ROBERT SCHWARTZ Attorney (of counsel) for Defendant

ADJOURNED: Application to conduct lineup is granted after oral argument

3/22/91

- s/ Vincent F. Naro
HON. VINCENT F. NARO

Supplement for Appellant with Attached Exhibits

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS — Part AA-2

SP0068-91

NYSID #5026622Q

In the matter of an Application by JOHN J. SANTUCCI, DISTRICT ATTORNEY, Queens County, for an Order directing that a lineup be held and that inmate Sherman Walker be placed in said lineup.

ORDER TO SHOW CAUSE

Upon the annexed affirmation of Gary F. Miret, dated March 18, 1991 and the affidavit of Detective James Redmond, Sh. #2970 complaint reports and upon all the proceedings heretofore had herein.

Let Sherman Walker show cause, at Part AA-2, of this Court, at the Courthouse, 125-01 Queens Boulevard, Kew Gardens, N.Y. on March 22, 1991 at 9 AM of said day or as soon thereafter as counsel may be heard,

Why an Order should not issue commanding and directing Sherman Walker to appear and participate in a lineup to be conducted by the Office of the District Attorney of Queens County at the 109th Precinct on March 25, 1991 or as soon thereafter as is mutually convenient, and it is hereby

Supplement for Appellant with Attached Exhibits

ORDERED, that the 18B County appointed counsel shall be appointed Counsel for Sherman Walker in the above entitled action and in all related proceedings and matters, and it is further

ORDERED, that counsel submit an Order to Produce Sherman Walker, to this Court no later than March 20, 1991, if counsel believes his presence to be required at the hearing on this matter. Failure of defense counsel to submit an Order to Produce for this Sherman Walker by March 20, 1991 will be deemed by this Court a waiver by counsel of Sherman Walker's presence at this hearing.

Sufficient cause therefore appearing, let service of a copy of this Order, together with the paper which it was granted, upon 18B County appointed counsel the attorney for the Sherman Walker on or before March 18, 1991 be deemed sufficient service.

Dated: Kew Gardens, N.Y.
March 18, 1991

s/ Vincent F. Naro
Justice of the Supreme Court
HON. VINCENT F. NARO

Supplement for Appellant with Attached Exhibits

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS — Part AA-2

NYSID 5026622Q

In the matter of an Application by JOHN J. SANTUCCI, DISTRICT ATTORNEY, Queens County, for an Order directing that a lineup be held and that inmate Sherman Walker be placed in said lineup.

AFFIRMATION

Gary F. Miret, under penalty of perjury and pursuant to Section 2106 of the C.P.L.R., affirms and says:

1. That I am an Assistant District Attorney of the County of Queens, of counsel to John J. Santucci, District Attorney of Queens County, and that I am in charge of the investigation of this case.

2. That the appearance of the above-named defendant is required in order to conduct a lineup relating to the charges of Robbery for which he is a suspect, said crimes having been committed in Queens County.

3. That probable cause exists to believe that the above-named committed the alleged crime for the following reasons:

Upon information and belief, and based upon information supplied to my office by Detective James Redmond, Sh. #2970, on January 18, 1991, January 24, 1991, January 25, 1991 and February 14, 1991, photographs of the

subject of this investigation Sherman Walker, NYSID #5026622Q were identified to Detective James Redmond, Sh. #2970 by the persons from whom the subject forcibly took property, in Queens County, on June 26, 1989, March 31, 1990, August 30, 1990, September 7, 1990, September 19, 1990 and October 5, 1990.

Annexed to this application are lettered exhibits. These exhibits are photocopies of official police reports, that establish more fully the circumstances of the incident and the identification.

It is therefore requested that 18B County appointed counsel in Queens be appointed counsel on this case for the subject of this investigation.

4. That the Office of the District Attorney of Queens County is to conduct a lineup at the 109th Precinct on March 25, 1991 between 7:00 – 9:00 p.m.

5. That no prior application has been made for the relief herein prayed for.

WHEREFORE, the People respectfully request that the Court issue an Order commanding and directing the defendant herein to appear and participate in the aforementioned lineup.

Supplement for Appellant with Attached Exhibits

Dated: Kew Gardens, N.Y.
March 18, 1991

Respectfully submitted,

JOHN J. SANTUCCI
DISTRICT ATTORNEY
QUEENS COUNTY

by: s/ Gary F. Miret
Gary F. Miret
Assistant District Attorney

Supplement for Appellant with Attached Exhibits

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM

NYSID #5026622Q

THE PEOPLE OF THE STATE OF NEW YORK

– against –

SHERMAN WALKER,

Defendant.

STATEMENT IN SUPPORT

STATE OF NEW YORK)

COUNTY OF QUEENS) :ss:

Detective James Redmond, Sh. #2970, being duly sworn deposes and says:

A photograph of subject SHERMAN WALKER, NYSID #5026622Q has been identified to myself as the person who forcibly took property from persons known to myself and the District Attorney's Office, on June 26, 1989, March 31, 1990, August 30, 1990, September 7, 1990, September 19, 1990 and October 5, 1990 in Queens County, by the persons from whom the property was taken.

Attached to this statement in support are photo copies of official police reports that more fully establish the circumstances of the incident and identification.

Supplement for Appellant with Attached Exhibits

I have read the above statement and swear that it is all true.

All false statements made herein are punishable as a Class "A" Misdemeanor pursuant to Section 210.45 of the New York State Penal Law.

s/ James Redmond
Detective James Redmond,
Sh. #2970

Dated: March 6, 1991

Supplement for Appellant with Attached Exhibits

COMPLAINT

Robbery

160.15

* * *

Actions of Victim Prior to Robbery, Larceny or Sex Crimes:
Working in Store

* * *

37A Living Together?
No

38 Can Identify?
Stranger

39 Comp. Rec'vd:
Radio

Will View Photo?
Yes

Will Prosecute?
Yes

Reporter ☐ Witness ☒

* * *

Supplement for Appellant with Attached Exhibits

Position/Relationship:
Sales person

* * *

Name of Location (Specific):
Jewelry store

40 Address/Location of Occurrence:
28-03 Steinway St.

41 Sec/Post of Occ.:
David

44 Visible by Patrol:
☐ Yes ☒ No

* * *

61 Rep. Ag'cy Code:
N.Y.P.D.

* * *

Case Status:
☒ Open ☐ Closed

Unit Referred To:
114 RIP

* * *

Supplement for Appellant with Attached Exhibits

Quantity	Article	Description – Brand, Model, Serial No.
1	Necklace	T/M Channel setting with herring bone chain and 1½ carat white stones (diamonds) valued at $2800.00
1	Bracelet	T/M (Square) woman's bracelet with 78 points of white stones (diamonds) valued at $2000.00

Property Summary

Item	64	66 Value Stolen
Jewelry	05	$4800.00

* * *

Total No. of Perpetrators:
Wanted 1

Weapon:
☒ Used ☐ Possessed

Describe Weapon (if firearm, give color, make, calibre, type, model, etc.):
Canister of mace

Wanted ☒ Arrested ☐

Supplement for Appellant with Attached Exhibits

Sex:
M

Race:
Blk

* * *

Age:
28-30

Height:
5 ft. 6-7 in.

Weight:
160

* * *

Hair Color:
Black

Hair Length:
Short

* * *

Accent:
West Indian French

* * *

Supplement for Appellant with Attached Exhibits

Clothing Description:
Short black leather jacket, Light blue jeans, black sneakers

* * *

List Additional Victims & Witnesses — (Reconstruct Occurrence including Method of Entry & Escape — include Unique or Unusual Actions:

Complainant present at the 114th Pct., states that at t/p/o, a male Black entered the place of business and pretending to be a customer, asked to see the above described items of jewelry. The male spent approximately 15 to 20 minutes in the store before he produced a small canister of mace and sprayed complainant and witness in face. The perpetrator at this time fled the store with the complainant in pursuit. He ran in the direction of Astoria Blvd., where complainant lost sight of him. [redacted] complained of a burning sensation in [redacted] face at the time of the incident, however, at time of report, [redacted] refused medical aid.

Latest Print Team:
☐ Yes ☒ No

Crime Prevention Survey:
☐ Yes ☒ No

Supplement for Appellant with Attached Exhibits

Complaint Report Prepared By:
CALANTJIS, S.

Title:
POLICE OFFICER

Command:
114 RIP

Name Printed:
CALANTJIS, S.

Tax Registry No.:
879401

Command:
114 RIP

* * *

BOROUGH ROBBERY SQD CASE # 92/91

Supplement for Appellant with Attached Exhibits

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Indictment # *2120/91*

THE PEOPLE OF THE STATE OF NEW YORK,

– against –

SHERMAN WALKER

Defendant,

AFFIRMATION

MICHAEL P. JOSEPH, being duly admitted to practice law in the State of New York, hereby affirms under the penalties of perjury as follows:

1. I represent SHERMAN WALKER in the above encaptioned matter.

2. I previously filed an omnibus motion seeking a variety of relief including the suppression of the identification take took place at a lineup and any in-court identification of the defendant.

3. In my previous affirmation, I set forth relevant facts regarding the lineup that took place in reference to the instant indictment. As stated in said affirmation, the defendant Walker was represented by your affirmant in a case pending

in Queens County at the time that he was placed in the lineup. In spite of this fact, your affirmant was not notified or given an opportunity to appear at said lineup.

4. Based upon the Voluntary Disclosure Form provided herein, it appears that the lineup that took place was compelled by court order. This fact, among others caused the defendant's right to counsel to attach. *People v. Jackson* 74 NY 2d 787.

5. The right to counsel is not satisfied by merely appointing a member of the bar. An accused has the right to have his own attorney representing him at any critical stage. I am informed by my client that he stated at said lineup that he was represented by your affirmant and therefore wanted to be represented at the lineup only by your affirmant.

6. In that I represented Sherman Walker on another pending case, and in that he requested that I be present, I should have been allowed the opportunity to appear as Mr. Walker's counsel at said lineup. *People v. Coates* 74 NY 2d 244.

WHEREFORE, your affirmant prays for the relief sought in the motion previously submitted or for any other relief that this court may deem just and proper.

DATED: May 22, 1991
New York, New York

s/ Michael P. Joseph
MICHAEL P. JOSEPH

Supplement for Appellant with Attached Exhibits

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF *NEW YORK*: Part 78

IND. NO. 338 #91

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

— against —

SHERMAN WALKER,

Defendant

Affidavit in Support of Motion for A New Trial

STATE OF NEW YORK)
County of *New York*) SS.:

I, *Terrence Heywood*, being duly sworn deposes and say that:

I reside at 106 Howard Avenue, Brooklyn, New York 11233.

1. I state that presently I made this affidavit without threat or fear of my liberty in support of Sherman Walker's motion for a new trial.

Supplement for Appellant with Attached Exhibits

2. I state that I do not personally know, Mr. Walker, or have associated with him in the past. However, I do acknowledge attending the same public school with Mr. Walker in the past, and only know we are from the same neighborhood.

3. I state, that I have previously conferred with a member of, Sherman Walker's family with regards to the statements contained in the two Police reports marked as Mr. Walker Exhibit (A) and (B) along with the transcripts of a Wade hearing minutes marked as Mr. Walker Exhibit (c) I believe; for which I am the subject of discussion contained therein.

I further state, I am the subject referred to in the Police interview reports in that the NYSID# 5537997P clearly matches the NYSID# NO. contributed to me.

4. I have been arrested before in the past. Although I have never been arrested by a Detective Frank Favilla, Shield #2048, of the M.T.S., R.I.P. till this present day. I do not personally know Detective Frank Favilla, Shield #2048, nor have I carried out any informant work for any member of the Police Department in the past. In that I am not a confidential informant with a Registered Number that has or have worked for Detective Frank Favilla, Shield #2048, in the past.

5. Further I do not personally know a Detective Redmond, Shield #2970, of Queens' Robbery Squad. Neither have I met with Detective Redmond on Jan. 15, 1991, at the N.Y.C. Correctional Facility, Brooklyn Brig, or informed him of any information of any kind against Mr. Walker in compliance with Detective Frank Favilla, Shield #2048, as indicated in

Supplement for Appellant with Attached Exhibits

Mr. Walker Exhibit (A) and (B), transcribed by Detective Redmond, Shield #2970.

6. I made the above determination when I actually observed the Police reports describing substance of this information. That this information transferred by Detective Frank Favilla, Shield #2048, of the M.T.S. R.I.P. Precinct was false and known by the detective to be false.

7. I swear that the aforementioned facts are true under the penalty of perjury.

Respectfully Submitted

s/ Terrence Heywood
Terrence Heywood

Sworn to before me this
26th day of December, 1992

s/ Pedro Escrogima
PEDRO ESCROGIMA
NOTARY PUBLIC State of New York
No. ____2759
Qualified in New York County
Commission Expires December 31, 1994

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED MARCH 18, 1996

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

VINCENT R. BALLETTA, JR., J.P.
CORNELIUS J. O'BRIEN
WILLIAM C. THOMPSON
DAVID S. RITTER, JJ.

92-01662
92-04929

The People, etc.,

respondent,

- v

Sherman Walker,

appellant.

(Ind. Nos. 6542/89 and 2120/91)

DECISION & ORDER

* * *

Decision and Order Dated March 18, 1996

Application by the appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, two decisions and orders of this court, both dated June 12, 1995 (*People v Walker*, __ AD2d __ [Case No. 92-01662]; *People v Walker*, __ AD2d __ [Case No. 92-04929]), affirming two judgments of the Supreme Court, Queens County, rendered February 27, 1992, and June 16, 1992, respectively.

ORDERED that the application is denied.

The appellant has failed to establish that he was denied the effective assistance of appellate counsel (*see, Jones v Barnes*, 463 US 745).

BALLETTA, J.P., O'BRIEN, THOMPSON and RITTER, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

March 18, 1996

NOTICE OF PETITION, WRIT OF CORAM NOBIS DATED NOVEMBER 24, 1995

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
APPELLATE SECOND DEPT.

QUEENS COUNTY
INDEX NO. 65 42#89, 2120#91

MANHATTAN COUNTY:
IND. NO. 338#91

SHERMAN WALKER

PETITIONER,

– AGAINST –

Legal Aid Society ex rel and its Member(s); Alden T. Lewis Esq; Samuel M. Feldman Esq; District Attorney Office

RESPONDENTS.

NOTICE OF PETITION
WRIT OF CORAM NOBIS

SIRS:

PLEASE TAKE NOTICE, that upon the annexed petition of Sherman Walker, duly sworn to on this 24th day of November, __ 99 and upon the supporting papers included herein and made part thereof to Special Term Part __, of the Supreme Court of the State of New York, to be held at the

courthouse located at 45 Monroe Place, New York, on the __ day of or as soon thereafter as counsel can be heard, for a WRIT OF HABEAS CORPUS, Pursuant to Article 70 of the Civil Practice Laws and Rules.

ORDERING, the release of said Petitioner Sherman Walker, and for such other and further relief as to this court may appear just, proper and equitable.

DATED: November 24, 1995
East Elmhurst, NY 11370

Respectfully submitted,

s/ Walker, Sherman

Notice of Petition, Writ of Coram Nobis

MEMORANDUM

In the instant matter COHEN V. STATE 269 N.Y.S. 2d 498, reads in the pertinent part section 430.30 of the Criminal Procedure Law, reads: "In all other cases, in such counties (within City of New York) when sentence in imprisonment, the commissioner of Correction of such City "must" deliver the defendant to the proper officer in execution of the judgement." The duty to deliver under the statue is clearly imposed on the commissioner of correction of the City of New York.

Petitioner request that this Court to apply the COHEN V. STATE instant matter heretofore and herein, and if the Court finds the imprisonment to be in violation of section 430.30 of the Criminal Procedure Law, ORDER the defendant's release or, place of imprisonment to comply with the provision of law contained in the Criminal Procedure law.

Respectfully submitted,

s/ Walker, Sherman

Notice of Petition, Writ of Coram Nobis

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
APPELLATE SECOND DEPT.

QUEENS COUNTY
INDEX NO. 6542#89, 2120#91

NEW YORK COUNTY:
338#91

Sherman Walker,

PETITIONER,

– AGAINST –

Legal Aid Society ex rel.; Alden T. Lewis; Samuel M. Feldman;
District Attorney Office

RESPONDENTS.

PETITION IN SUPPORT OF
WRIT OF CORAM NOBIS

TO: SUPREME COURT OF THE STATE OF NEW YORK:
SPECIAL TERM:

Petitioner Sherman Walker respectfully states:

That the respondents violated certain rights guaranteed under the New York Constitution by harming the Petitioner by means of delayed imprisonment, malpractice, negligent,

nominal misrepresentation by permitting a pattern of illegal procedures and illegal treatment and abuse which was known to them or should have been known to them under Law.

JURISDICTION

This action is brought pursuant to a writ of coram nobis on the grounds that the circumstances surrounding, the misrepresentation and obstruction of petitioners' (Appeal) warrants custody under the 1st, 4th, 5th, 6th, 8th and 14th Amendment of the Constitution. Petitioner, further invokes the pendant jurisdiction of this Court to hear and decide his claim arising out of state law.

PARTIES INVOLVED

(1). Petitioner, at all times herein, is a citizen of the United States and a resident of Kings County, City of New York.

(2). The Respondent(s), Legal Aid Society, 15 Park Row, New York, N.Y. 10038, was and still is a division of and/or municipal corpor. agency existing in New York under said Laws.

(3). Respondents, Philip L. Weinstein Esq, James Branden Esq, Joel Atlas, Hillard Wiese Esq, and chief member(s) are all owner(s) of and in possession of exclusive control of certain premis(es) at the Legal Aid Society these respondents handle criminal Appeals as of Right.

(4). Respondents, Alden T. Lewis and Samuel M. Feldman were and still are the perspective owner(s) and or Partners

of the Law Office at (527) Quincy Street Brooklyn N.Y. 11221; Law Office of (350) Broadway N.Y. 10013 each respectively. Each firm are operated by the member under the existing Laws of the State.

(5). At all time herein, the Respondent District Attorney Office in Manhattan and Queens County were in charge of function in prosecuting Petitioner Appeals herein out.

Upon information and belief, each respondent were acting in their official capacity and each of them acted in the furtherance of their own interest against the Petitioner rights.

* * * * * * * *

Petitioner, humbly urges this Court to conduct investigative action into the background of his Complaint and grant me Counsel to assist him at each and every stage of the proceeding, that the Court may give due consideration to Petitioner claim.

STATEMENT OF CLAIM AND FACTS

James M. Branden, an attorney associated with Philip Weinstein, Esq. whom were assigned by order of the Appellate Division First Department dated __ day of MAY, 1993, to represent the Petitioner of his appeal(s) from a Judgment of the Supreme Court, New York County, under IND. 338#91 rendered on Feb. 13, 1992, convicting Petitioner after a Jury trial of robbery in the First degree [P.L. 160.15] and robbery in the Second degree [P.L. 160.10]

and sentencing thereon (Uviller, J. at trial and sentence). Petitioner's state appeal was denied by the App. Div. Dept., 3 day of OCT., 1995. The motion for leave to appeal Court of Appeal was denied on __ day of _____ (see, Exhibit (A) enclosed herein). Additionally, Phillip L. Weinstein, was assigned to represent Petitioner on his appeals of a Judgment of the Supreme Court Queens County, under indictment NO. 6542#89 rendered on __ day of FEB., 1993, convicting Petitioner after a Jury trial of robbery in the Second degree [P.L. 160.10] and Sentencing him thereon (Beerman, J, at trial and sentence) and Philip Weinstein, Esq. was assigned to represent Petitioner on his appeal of a County, under IND. NO. 2120#91, rendered on __ day of June, 1992. Upon an Alford plea to robbery in the Second degree [P.L. 160.10] to run concurrent with IND. NO. 6542#89 (Beerman, J. at plea and sentence). Petitioner state appeal was denied by the App. Div. Second Dept. on 12 day of June, 1995. The motion for leave to Appeal to the Court of Appeals was denied on __ day of _____, 199__. (*See* Exhibit (A) enclosed hereinto).

Petitioner, states that the respondent(s) were all made full aware with these proceeding in these case(s) and have supposely willfully neglected to examine the record below as to the allege "informant" in question as he did not create an alleged conflict of interest concerning this appeal herein:

After a Wade hearing, but prior to trial on one of the Queen(s) County charges, Petitioner, trial Counsel had received additional *Rosario* material. From one of the documents turned-over it was learned that detective Jame Redmond Sh #2970 the arresting Officer in the Queens

County charge had alleging spoke with a so-called informant, who allegingly happened to be represented by Legal Aid Society at the time. Trial Counsel stated on record that "upon information and belief, [he] believe[d] [the informant] was the source of the information which led to Petitioner being placed under arrest held for lineup(s) then ultimately to arrest Petitioner. In no material way was these facts investigated by the respondents herein even when Petitioner brought to their attention that no confidential informant had existed as falsely claimed by the detective Redmond. (*See*, Exhibit (B) enclosed hereinto).

Under these circumstance(s), it did not constitute a conflict of interest for James M. Branden, to continue to represent Petitioner on his Appeal p[illegible] and the fact that Legal Aid moved to be relieved under Branden motion this Court did violate Petitioner Right to Appeal Counsel as of right. More the respondent(s) Hillard Wiese, Joel Atlas, Alden T. Lewis, Samuel Feldman all remaining inactive at investigating the background the alleged incriminating source supposely represented by Legal Aid Society obstructed Petitioner from receiving the required representation from the Legal Aid Society (*see*, Exhibit (C) [illegible] herein). On or about May of 1993 this [illegible] Petitioner Appellate right(s) and process.

Despite having advised the Attorney in charge of Legal Aid Society of the Attorney James Branden delinquency at correct, the apparent misrepresentation, for the remainder of the appeal, Legal Aid never moved to checked into their client information that shedded light on the non-conflict of interest issue, nor removed Branden and re-assigned new

appellate Counsel to represent Walker's appeal (i.e. their failure to do so denied Petitioner his right to Counsel on appeal). The two 18B appointed should not have been assigned to represent Walker at all on Appeal. Since Petitioner's appeal was actually heard, and since he was misrepresented by Counsel's not assigned as of (right) on his appeal, the prejudice Walker suffered from this neglect deprived him of a fundamental constitutional right to obtain a fair review of his conviction while being properly represented by Legal Aid when their obligation attached upon initial assignment.

Petitioner, argues he is entitled to release, alternatively, a new trial(s because this delayed "nominal misrepresentation" of Petitioner appeal cannot cure the per se due process violation and resulting prejudice of his deprived right to Counsel, under Professional Responsibility. DR5-105(A, C). Specifically, Legal Aid acted contrary to the provisions of Rule DR5-105(C) and to extent in DR5-105(A), as well under the Law.

PREJUDICE CRITERIA ASSERTED TO WARRANT HABEAS RELIEF FOR RELEASE OR NEW TRIAL.

First, the length of the delayed nominal misrepresentation was clearly prejudice; Petitioner appeal was not routine and was actually perfected within the required period of time by his original assigned attorney as of right. Second, no acceptable reason for their misrepresentation can be justified as to why the allege conflict of interest claim thoroughly existed; in that the appointed Legal Aid Society had neglected to monitor Branden critical legal steps taken in Petitioner

case. Third, Petitioner assert that prejudice was felt because he did not waive his right to appeal and to be represented by his Counsel as of right; instead Petitioner repeated efforts to alert Legal Aid went in vain. Finally, prejudice can be seen because of each attorney (18-B) appointed Counsel poor quality of work undermined the out-come of this Appeal and that Petitioner labored under a conflict of interest during this period (*see*, e.g. *ELCOCK* v. *HENDERSON*, 28 F.3d 276 (.2nd Cir. 1994). In light of these circumstances, this neglect to correct the problem prejudice Petitioner to due process right to a speedy appeal and to be represented by his Counsel as of right. Canon 9 A.B.A. Code of Professional Responsibility DR5-105(A, C).

* * * * * *

(6). Petitioner believe he did substantiate his complaint that his right to appeal had been violated by inattention and time consuming procedures frustrated Petitioner's due process right (*Robertson* v. *State of Connecticut*, 501 F.2d 305, 309-10 (.2d Cir. 1974), include only the length of delay suffered by Petitioner but also the respondent's lack of legitimate reason for it. Petitioner repeated assertion of his right to a speedy representation of his appeal which he was due. *Baker* v. *Wingo*, 407 U.S. 514, 530-33, 92 S.Ct. 2182 (1972), by assigned Counsel of Legal Aid Society as of right.

(7). This court make whatever ORDER is required for the [illegible] Prosecution is ORDER to Facilitates the Administration of Justice sought herein, as the court may deem just and proper.

Notice of Petition, Writ of Coram Nobis

DATED: November 24 1995
East Elmhurst, NY 11370

Respectfully submitted,

s/ Walker, Sherman
Mr. Walker Pro Se
14-14 Hazen St.
East Elmhurst, N.Y. 11370
[8959502756 3bk]

Sworn to before me this
24 day of November 199__

s/ [illegible]
COMMISSIONER OF DEEDS/NOTARY

**Please Note My Address*
May be Subject to Change.

AFFIRMATION IN OPPOSITION TO DEFENDANT'S APPLICATION FOR A WRIT OF ERROR *CORAM NOBIS* DATED FEBRUARY 8, 1996

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Queens County Indictment Numbers
6542/89, 2120/91
AD Nos. 93-05226; 93-05228

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

– against –

SHERMAN WALKER,

Defendant-Appellant

AFFIRMATION IN OPPOSITION TO DEFENDANT'S APPLICATION FOR A WRIT OF ERROR *CORAM NOBIS*

ROBERT KATZMAN, an attorney admitted to practice in the State of New York, affirms the following statements to be true under the penalties of perjury:

1. I am an Assistant District Attorney, of counsel to Richard A. Brown, the District Attorney of Queens County. I am submitting this affirmation in opposition to defendant's application for a writ of error *coram nobis*. I make the statements in this affirmation upon information and belief,

based upon my review of the records and files of the Queens County District Attorney's Office.

2. Defendant was convicted by a jury trial on February 27, 1992, in the Supreme Court, Criminal Term (Beerman, J.) of Robbery in the Second Degree and was sentenced to seven to fourteen years imprisonment under Indictment number 6542/89. On June 6, 1992, defendant was sentenced to seven to fourteen years imprisonment after pleading guilty to Robbery in the First Degree under Indictment Number 2120/91 (Beerman, J.).

3. Defendant has twice moved in the court below to have his judgment of conviction vacated pursuant to C.P.L. § 440.10. These motions were denied on February 8, 1993 and June 28, 1993, respectively (Finnegan, J.).

4. Following defendant's conviction, the Legal Aid Society was appointed to represent him on his appeal. The Legal Aid Society, however, filed a motion to be relieved of the assignment claiming a conflict of interest; the People filed a motion in opposition to Legal Aid's motion. Defendant did not oppose the Legal Aid Society's request to be relieved. This Court granted Legal Aid's Motion on May 12, 1993 and assigned Alden T. Lewis as counsel for defendant.

5. Defendant's writ of error coram nobis, which claims that the Legal Aid Society should not have been relieved as assigned counsel on defendant's direct appeal, should be denied. As a threshold matter, defendant's claim that the Legal Aid Society should not have been relieved is untimely.

Affirmation in Opposition

Had defendant wished to oppose the motion to be relieved, he could have done so at the time the motion was made. Indeed, the People opposed the motion. This Court decided the motion after careful consideration of the basis asserted by the Legal Aid Society — an alleged conflict of interest — and defendant cannot reopen the issue in an application for a writ of error *coram nobis*.

Defendant misconstrues the purposes and the limitations of the writ of error *coram nobis*. Indeed, defendant's current application makes no clear claim of ineffectiveness of appellate counsel. To the degree that defendant asserts that a claim should have been made on his direct appeal regarding the confidential informant's role in defendant's arrest, and it is not even clear from his motion papers that he does so, the brief filed by Alden T. Lewis, defendant's appellate counsel, properly raised such a claim, as noted by Mr. Lewis in his affirmation of January 26, 1996, submitted to this Court in response to defendant's current application. As explained by Mr. Lewis, he raised an issue on appeal regarding the prosecution's purported failure to disclose the informant's identity and the trial court's refusal to reopen the *Wade* Hearing based upon the discovery of the informant. Notably, these claims were made only with respect to indictment 2120/91. Mr. Lewis properly concluded that the confidential informant had no relevancy to defendant's other conviction, under Indictment 65421/89.

Defendant does not, in any way, contend that counsel's presentation of these issues on direct appeal was defective. Indeed, to the extent that his motion can be read as making an ineffectiveness of counsel claim, it asserts only that

counsel should have argued that there was no basis for the Legal Aid Society's request to be relieved as there was no conflict of interest. But this would not have been a proper claim to raise on direct appeal.

A criminal defendant is afforded the constitutional right to the effective assistance of counsel on any appeal granted him as a matter of right. *Douglass v. California*, 372 U.S. 353, 357-358 (1963) (announcing principle, based on equal protection clause). Because New York State, by Criminal Procedure Law § 450.10(1), does grant a criminal defendant an initial appeal as of right to an intermediate appellate court, its statute implicates the constitutional principles announced in *Douglass*, and requires that a defendant on that initial appeal receive the assistance of counsel. That assistance is subject to the usual constitutional scrutiny: the assistance afforded a defendant in such instances must be effective assistance. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (requiring the effective assistance of counsel in any appeal granted defendant as a matter of right); *People v. Ramos*, 108 A.D.2d 209, 210-211 (2d Dept. 1985) (accurately stating principle, though erroneously delegating trial court as the appropriate forum for litigating question of appellate counsel's effectiveness). The Court of Appeals, in *People v. Bachert*, 69 N.Y.2d 593, 599 (1987), ultimately determined that the proper forum for such relief lay in the intermediate appellate court, when the alleged ineffectiveness had earlier occurred in that forum. Therefore, an ineffectiveness of appellate counsel would be properly brought before this Court.

But appellate counsel need not raise all issues or even all meritorious issues — suggested to him by his client, to

meet the constitutional standard of effective assistance. Hence, in *Jones v. Barnes*, 463 U.S. 745 (1983), the Supreme Court held that an appellate attorney did not violate his client's Sixth Amendment rights when counsel refused to prepare a brief raising all of the issues that his client had directed him to address.

Nevertheless, to succeed, a claim of ineffective assistance of appellate counsel must demonstrate true ineffectiveness, rather than mere disagreement. *People v. Benn*, 68 N.Y.2d 941 (1986). Defendant has failed to raised any issue to demonstrate any true ineffectiveness of appellate counsel. In addition, an examination of the appellate brief filed on defendant's behalf reveals counsel's professional representation of defendant did not fall below the minimal requirement that counsel provide "meaningful representation," as of the time of the representation, *People v. Baldi*, 54 N.Y.2d 137, 147 (1981), to meet the New York standard. Furthermore, counsel provided "objectively reasonable representation," to meet the federal standard. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

As noted above, there would have been no legitimate basis for appellate counsel to contend on direct appeal that the Legal Aid Society had been improperly relieved as defendant's assigned counsel. This Court had already considered that issue in that it granted the Legal Aid Society's motion to be relieved, over the People's opposition, and appellate counsel could not have re-argued that issue, on direct appeal. That being the case, defendant has no basis now to claim that appellate counsel was ineffective for failing to raise the issue on direct appeal. Additionally, as shown

above, appellate counsel did raise on direct appeal two legitimate issues concerning the confidential informant's role in defendant's conviction under Indictment 2120/91. Defendant makes no showing that appellate counsel's treatment of those claims was defective in any manner. Consequently, his current assertion that appellate counsel was somehow ineffective has no basis in fact or law.

Therefore, for the above stated reasons defendant's motion should be denied.

Dated: Kew Gardens, NY
February 8, 1996

s/ Robert Katzman
ROBERT KATZMAN
Assistant District Attorney
(718) 286-5840

To: Sherman Walker
92-A-7141
Box 500
Elmira, NY 74902

OPINION OF THE COURT OF APPEALS OF NEW YORK DATED AND DECIDED SEPTEMBER 26, 1995

COURT OF APPEALS OF NEW YORK

Mo. No. 931

In the Matter of Sherman Walker,

Appellant,

v.

Lawrence J. Finnegan, &c., et al.,

Respondents.

* * *

September 26, 1995, Decided

OPINION:

Motion for leave to appeal &c. denied.

VERIFIED PETITION FILED WITH COURT OF APPEALS OF THE STATE OF NEW YORK DATED JUNE 13, 1995

COURT OF APPEALS OF THE
STATE OF NEW YORK

Ind. No.: 6542#89, 2119#91, 2120#91

In the Matter of the application of
Sherman Walker,

Petitioner

FOR A JUDGMENT PURSUANT TO ARTICLE (78)
IN THE FORM OF MANDAMUS

vs.

Justice Finnigan ex rel.,

Respondent.

Verified Petition

I, Sherman Walker, the above named Petitioner duly deposes and says:

I hereby respectfully move this Court pursuant to (C.P.L.R.) 5601 sec. subd. (A) para. (ii); (b) para. (1) and (2); (C.P.L.R.) 7801-4 that this case involves a serious question of constitutional error(s) which ought to be reviewed by this Court based on the Appellate Division Second Department adverse order entered Jan. 17, 1995, denying

Verified Petition Dated June 13, 1995

Petitioner's application for Mandamus relief and Petitioner takes leave to this Court in the interests of justice as well. (*See*, copy of order attached to Appendix).

QUESTION PRESENTED

That the Appellate Division Second Department review of Petitioner Mandamus were rendered an abuse of discretion as a matter of law in that the trial Court failed to compel the determination of Petition's Motion submitted there to vacate certain Judgments in light of the People's failure to respond to Petitioner's Motion pursuant to (C.P.L.) 440.10 and 440.30, U.S.C.A. CONST. Amend. 14; N.Y. Const. Art. I, sec. 6.

STATEMENT OF THE CASE

Petitioner's contention is repeated in this proceeding namely that: he had an absolute due process right to have had his motion to reargue and a Motion for Summary Judgment relief granted in the lower trial court, and that the Appellate Division Second Department while reviewing petitioner Mandamus motion unfairly refused to act against the lower court for their deliberate failure to enforce the C.P.L. statutory requirement under (C.P.L.) 440.10 and 440.30 in favor to petitioner, especially when as here, the District Attorney Office did "NOT" respond at all to the Motion that had been pending before the trial Court, nor had the trial Court exercised its option to grant said Motion in light of the people's failure to respond. The trial Court was constitutionally obliged to follow the statutory language under (C.P.L.) 440.30(1)(7). In fact, the people in response

to Petitioner Mandamus had conceded in their Petition that they "NEVER" actually served a response against the then pending 440.10 motion. (*See*, e.g. the respondent's response to the Petitioner Mandamus at pages 2-3 in their brief). Furthermore, it was injudicious for the Appellate Div. 2d Dept. to indicate in their Court order to the effect that, "We note the motion to reargue has been decided," which this Court can find this statement by the Appellate Div. 2d. Department were "totally" unsupported by the proceeding paper(s) that had went before the lower trial Court as well as the record presented to the App. Div. 2d Dept., therefore, petitioner respectfully submit that pursuant to (C.P.L.R.) article (78) in the nature of Mandamus, inter alia, his motion to compel the people to act on petitioner's motion to vacate certain Judgments is reviewable by this Court to determine whether the App. Div. 2d Dept. were very unfair in its evaluation constituted an abuse of discretion as a matter of Law. Finally, this Court must under the existing (State) Laws correct the intermediate Court analysis, because there were no justifiable reason why the lower Court did not act according to the dictates of the statute under C.P.L. 440.10 and 440.30, when Petitioner demonstrated a clear legal right for the relief sought before the Appellate Div. 2d.

Accordingly, petitioner Motion should be granted relief therein throughout.

Verified Petition Dated June 13, 1995

Argument In support Of Granting Mandamus.

I. Appellate Division Second Department Was A Conflict with the prior decision of this Court.

First, the App. Div. 2d Dept. reliance upon the *Matter of Legal Aid Society of Sullivan Co.* vs. *Sheinmen*, 53 N.Y.2d 12 at p. 16 were inappropriate to justify the denial of petitioner's motion and were wrongfully interpreted against him. In the present situation before this Court there was "NO" other way for Petitioner to obtain full judicial review of his claim that was pending before the trial Court.

While Collateral proceedings in a criminal matter are disfavored (e.g. *Matter of State of New York* vs. *King*, 36 N.Y.2d 59, 364 N.Y.S.2d 879, 324 N.E.2d 351) it is elementary that, where a duty is merely ministerial, mandamus lies (*See*, *Artis* v. *Keegan*, 77 Misc.2d 638, 354 N.Y.S.2d 504; McKinney's Cons. Laws of N.Y., book 7B, C.P.L.R. 7801, C. 7801:9 page 38). That is the case in this instance.

The constitutional question arises in the context of the Petitioner's (C.P.L.) 440.10 and 440.30 information lodged against the People in the County of Queens went unanswered. At the threshold, the appellate Court lost cite of the fact that the respondent in their response to Petitioner's Mandamus in paragraph (6) indicated that the trial Court denied the petitioner's motion to vacate certain Judgment of conviction in an "oral" decision at the bench (respondent affirmation at page 2), in lack of compliance with the statutory requirements. The Court did not receive a written response

from the opposing party against Petitioner 440.10 Motion and by not issuing a written decision after both parties submission papers became final in the matter, the trial Court alleged oral decision denying petitioner motion was in direct violation of the statutory pulsory due process requirement afforded by the statute. (*See* C.P.L. 440.30(5), (7)). Therefore, the Appellate Div. 2nd. Dept. mischaracterize these circumstances when they had "ruled" against petitioner that the (C.P.L.) 440.10 motion were decided in the trial. Even assuming for the sake of argument the lower Court was right when it decided upon the Petitioner's motion orally without first receiving a written response from the People's position, the statutory language forbids this kind of actions to be taken by the trial Court while deciding over (C.P.L.) 440.10 proceeding. (*See* C.P.L. 440.30(7)(3)).

In an effort to meet the rigorous requirements for a writ of Mandamus, Petitioner argues first, that the lower Court by not ordering the respondents to return a written response against petitioner motion, or, alternatively, set down an evidentiary hearing nor file its own written decision on the Law and facts the Court then exceeded its statutory authority and second, that the lack of compliance with the statutory dictates in (C.P.L.) 440.10 and 440.30 denied Petitioner his Constitutional rights and was an abuse of discretion as a Matter of Law.

CONCLUSIONS

The Appellate Division Second Department Judgment should be reversed, and proceeding reinstated in a proceeding pursuant to (C.P.L.R.) (78) to compel the lower Court to

comply with Criminal Procedure Law Sec. 440.10 and 440.30 and striking the Appellate Division Second Department Contrary finding.

Respectfully yours,

s/ Walker, Sherman
Mr. Walker (Pro Se)
Drawer B
Stormville, N.Y. 12582
[92A7141 220]

SWORN TO BEFORE ME
on 13 day of June, 1995.
Notary Public

s/ Paul W. Sargent
PAUL W. SARGENT
Notary Public, State of New York
No. 01SA5037628

DECISION AND JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED JANUARY 17, 1995

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

SONDRA MILLER, J.P.
CHARLES B. LAWRENCE
DAVID S. RITTER
VINCENT PIZZUTO, JJ.

94-09943

In the Matter of Sherman Walker,

petitioner,

v

Lawrence J. Finnegan, etc., et al.,

respondents.

DECISION & JUDGMENT

* * *

Proceeding pursuant to CPLR article 78 in the nature of mandamus, *inter alia*, to compel the determination of the petitioner's motion to reargue a motion to vacate certain judgments.

Decision and Judgment Dated January 17, 1995

Upon the petition and papers filed in support of the proceeding, and the papers filed in opposition thereto, it is

ADJUDGED that the petition is denied and the proceeding is dismissed, without costs or disbursements.

The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only when there exists a clear legal right to the relief sought (*see, Matter of Legal Aid Society of Sullivan County v. Scheinman,* 53 NY2d 12, 16). The petitioner here has failed to demonstrate a clear legal right to the relief sought.

We note that the motion to reargue has been decided.

MILLER, J.P., LAWRENCE, RITTER and PIZZUTO, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

January 17, 1995

COVER SHEET OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED NOVEMBER 15, 1994 AND ARTICLE 78 MOTION

APPELLATE DIVISION
SUPREME COURT OF THE STATE OF NEW YORK
SECOND JUDICIAL DEPARTMENT
45 MONROE PLACE
BROOKLYN, N. Y. 11201

MARTIN H. BROWNSTEIN
CLERK OF THE COURT

ARNOLD EDMAN
MEL E. HARRIS
DEPUTY CLERKS

November 15, 1994

Sherman Walker
92A7141
Box 500
Elmira, NY 14902

RE: 94-09943
Mtr. of Sherman v Finnegan
Orig. Proceed WALKER

Dear Sir/Madam:

We have received your application for the following relief: FOR AN ORDER UNDER ARTICLE 78 IN THE NATURE OF A WRIT OF MANDAMUS.

Cover Sheet and Article 78 Motion

The application will be placed on the motion calendar for 12/2/94

Yours truly,

CLERK'S OFFICE

NOTICE TO: Attorney General NYC &
Richard Brown w/papers

Dear Sir/Madam:

The above mentioned application will be placed on the motion calendar for 12/2/94. On or before that date, please furnish the Motion Clerk with an affidavit expressing your views in this matter.

Yours truly,

CLERK'S OFFICE

Cover Sheet and Article 78 Motion

In the name of Allah, Most High

Mr. Sherman Walker
Elmira CORR. FAC.
Elmira, NY 14902

Dated: 25 day of Oct. 1994.

Appellate Division 2nd. Dept.
Supreme Court
B'klyn., NY 11415

Re: Pro-Se Mandamus Motion
Ind. No. 6542/89, 2119/91 and 2120/91

Dear Court Clerk:

Please find enclosed is the Article (78) motion in the form of Mandamus and Prohibition, for relief in connection with the above indictments number.

Please forward my Motion to a Justice of this Court for a determination and decision.

Thank you much.

Respectfully,

s/ Walker, Sherman
Mr. Walker — 92A7141-I-1-20

Cover Sheet and Article 78 Motion

[illegible]
the Supreme Court of the State of New York, held in and for the County of Queens at the County Courthouse thereof on the __ day of _____, 199__.

PRESENT:

HON. _____
Justice

Index #

SHERMAN WALKER

Plaintiff,

vs.

Finnigann, Justice and District Attorney Office

Defendant.

ORDER TO SHOW CAUSE

Upon reading and filing the affidavit of SHERMAN WALKER sworn to on the 24th day of Oct., 1994, and upon the Petition and exhibits annexed hereto

Let the defendant or his attorney show cause at an IAS Part ____ of this Court, to be held at the Courthouse,

Cover Sheet and Article 78 Motion

Brooklyn, New York, 11415, on the __ day of _____, 1994, at ____ o'clock in the ____noon or as soon as counsel may be heard why an order should not be made

Mandamus and Prohibition relief as well

SUFFICIENT CAUSE APPEARING THEREFOR, let Personal service of a copy of this order, the summons and the papers upon which this order is granted upon the defendant on or before the __ day of _____, 199__ be deemed good and sufficient.

ENTER

_____

J.S.C.

Cover Sheet and Article 78 Motion

APPELLATE DIVISION : SECOND DEPARTMENT

Queens County Ind. No.: 6542#89, 2119#91, 2120#91
AD #: 93-0522

In the Matter of the Application of
Sherman Walker,

Petitioner,

For a Judgment pursuant to Article (78), (22) of the
Civil Practice Law and Rules

vs.

Justice Finnigan, of the Queens County, Crim. Court,
Part K-9; Ass't Dist. Attorney John Doe,

Respondent(s).

VERIFIED PETITION

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The Petitioner of *Sherman Walker* respectfully alleges that:

(1). This is a special proceeding brought pursuant to Article (78) C.P.L.R..

(2). Pursuant to C.P.L.R. (Sec.) 7801, 7804-5 and 506(b) venue of this proceeding is in Queens County because that is where the material facts took place.

(3). This Petition challenges: The lower Court failure to grant Petitioner the relief requested in his C.P.L. 440.10 motion dated 28 day of July, 1993, and calendared on 28 day of Sept., 1993. In light of the District Attorney Office continued failure to respond.

PARTIES

(4). Petit., *Sherman Walker*, is a prisoner presently serving an indeterminate term of imprisonment in the State of New York and as such, is in the care and custody of the N.Y.S. Dept. CORR. Ser. at Elmira New York 14902-0500.

(5). *Upon information and belief*, the Respondent Finnigan is a Supreme Court Justice. In that capacity, he is the chief executive Officer of the Court room K-9 and has the statutory authority and responsibility to fairly review Criminal Proc. Law, Penal Law, Motions by Counselors or pro-se litigants pursuant to his judicial function.

(6). *Upon information and belief*, the respondent *John Doe* is an Ass't District Attorney. In that capacity, he/she is assigned to direct or conduct pre-trial hearings, evidentiary hearings and trials and respond to motion paper(s) submitted to the Court against the People of the State of New York.

FACTS

I am fully familiar with all the facts and circumstances surrounding this case as set forth herein based on a thorough review of my records and file.

Cover Sheet and Article 78 Motion

I. THE RESULTS OF STEPS TAKEN ON THE FIRST (C.P.L.) 440.10 MOTION

Petit. had twice moved in the Court below to have his Judgment of Conviction vacated pursuant to C.P.L. 440.10. These Motions were denied on February 8, 1993 and June 28, 1993, respectively (Finnegan, J). (*See*, Exhibit A and B attached).

II. THE LOWER COURT FAILED TO GRANT THE PETIT. C.P.L. 440.10 TO RENEW AND/OR SUMMARY JUDGMENT MOTION

Appellant went back in the Sup. Ct. QRS. Co. on Aug. __, 1993, by way of a motion pursuant to (C.P.L.) 440.10 in accordance with (C.P.L.R.) 2221 to renew based on newly discovered evidence which were supported by an affidavit of a witness name Terrence Heywood (*See*, *Copy* of that Motion attached hereto as Ex. (C).). No new trial or evidentiary hearing was ever held. Consequently, a second motion was filed by way of a summary-judgment. The District Attorney Office did not file an answer at all. (*See Copy* of that motion attached hereto as Ex. (D).). Til this day, the District Attorney's Office have failed to answer any one of these Motions filed with the Court below even when the Clerk of that Court had calendared the renewal motion for the 28 day of Sept., 1993. (*See* Copy of Court notice attached hereto as Exhibit (E)).

Cover Sheet and Article 78 Motion

ARGUMENT

Petitioner alleges that he "*did*" receive notice that the lower Court were in receipt of his Motion to renew (*See* Ex. (E) supra), however, he did *not* receive notice that the people made a determination within the requirement pursuant to (C.P.L.) 440.30(4). Petitioner further alleges that he did not receive notice of an evidentiary hearing nor a new trial which should have been directed by the trial Court in light of the People failure to respond to appellant petition "period".

CAUSE OF ACTION

That Petitioner is entitled to Mandamus and prohibition relief in the present case.

Mandamus is available in the present situation where no adequate remedy exists by way of appeal. Prohibition is available also in that the Petitioner's direct appeal is pending before this Court and should be stayed pending the out-come of this motion (*See*, Copy of Exhibit (f)).

This proceeding was brought to compel Respondent, Justice Finnigan of the Queens County Court to comply with the statutory provisions under (C.P.L.) Art. 440.10 and 440.30, which is outlined in Petitioner's moving papers. (*See* Exhibits attached hereto). It is Petitioner claim that respondent failed to comply with the appropriate (C.P.L.) Art. 440.10 requirements and accordingly Petitioner is entitled to an evidentiary hearing or a new Trial (*See*, C.P.L. 440.30 subd. (5)). Moreover, Petitioner argues that no final

determination took place concerning issues filed before the trial Court until he the (i.e. the aggrieved party) is notified (*see, e.g. Russo* v. *Nassau Community College*, 147 Misc.2d 174, 554 N.Y.S.2d 774 at p. 775).

Furthermore, the petitioner motion to renew were known to the District Attorney Office and the trial Court; the petitioner interest was substantially affected by the act of the respondents and that due process of an actual notice of a final determination should have actually been given by the People. *See, McCann* v. *Scaduto*, 71 N.Y.2d __, 524 N.Y.S.2d 398; (C.P.L.) Article 440.30(4), (5) imposes upon respondent the lower Court the duty "to provide a hearing and/or trial as a matter of right, to any Petitioner's upon such proof in petitioner motion papers stand unchallenged or properly rebutted by the People." *See* (C.P.L.) 440.30(4) Subd. (a), (b) and (c).

No previous application has been made to any Court for the relief requested herein.

WHEREFORE, the appellant/petitioner prays that a judgment under the provision of (C.P.L.R.) Art. (78) 78-4 in Mandamus form C7801:3 at p. 30-1 as well as prohibition in accordance with (C.P.L.R.) 5225 subd. (b); 409 subd. (b); C.P.L.R. 410 be granted:

(1). Remanding this (C.P.L.) 440.10 motion back to the trial Court of Queens County Part K-9 before Justice Finnigan and order that the respondent(s) comply with the statutory provision under (C.P.L.R.) Article 440.10 and C.P.L. 440.30 because of the People failure to act according to the Law.

(2). That this proceeding in connection with the matter of appellate direct appeal presently pending before this Court be and hereby prohibited of further resolution and stayed pursuant to Article 78 in accordance with C.P.L.R. 2201 until due deliberation have been held upon the instant proceeding.

Dated: 24th day of Oct., 1994
ELMIRA, NEW YORK 14902-0500

s/ Walker, Sherman
Petitioner/Appellant
Pro-se #92A7141#I-1-26
Elmira CORR. FAC.
Elmira, NY 14902

to:

Hon. Brownstein, Chief Clerk
App. Div. 2nd. Dept.
45 Monroe Place
B'klyn., NY 11201

AFFIRMATION IN OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER UNDER ARTICLE 78 DATED DECEMBER 2, 1994 AND ACCOMPANYING MATERIALS

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Queens County
Indictment numbers
6542/89, 2119/91,
2120/91

AD #s: 93-05226,
92-02880, 92-01662

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

SHERMAN WALKER,

Defendant.

Return Date:
December 2, 1994

AFFIRMATION IN OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER UNDER ARTICLE 78 IN THE NATURE OF A WRIT OF MANDAMUS

Affirmation in Opposition Dated December 2, 1994

ERIC ROTHSTEIN, an attorney admitted to practice in the courts of the State of New York, affirms the following statements to be true under the penalties of perjury:

1. I am an Assistant District Attorney, of counsel to Richard A. Brown, the District Attorney of Queens County. I am submitting this affirmation in opposition to defendant's motion for an order under Article 78 in the nature of a Writ of Mandamus. I make the statements in this affirmation upon information and belief, based upon my review of the records and files of the Queens County District Attorney's Office, the official court files, and my conversation with Justice Finnegan's law secretary.

2. On February 27, 1992, defendant was convicted after a jury trial of Robbery in the Second Degree and sentenced to seven to fourteen years imprisonment under Indictment Number 6542/89 (Beerman, J). On April 9, 1992, defendant was convicted of Robbery in the Third Degree and sentenced to three and one-half to seven years imprisonment under Indictment Number 2119/91 (Beerman, J). On June 6, 1992, defendant was sentenced to seven to fourteen years imprisonment after pleading guilty to Robbery in the First Degree under Indictment Number 2120/91 (Beerman, J).

3. Defendant has twice moved in the court below to have his judgment of conviction vacated pursuant to C.P.L. § 440.10. These motions were denied on February 8, 1993 and June 28, 1993, respectively (Finnegan, J).

4. On August 9, 1993, defendant filed another motion to vacate his judgment of conviction pursuant to C.P.L.

§ 440.10, alleging new evidence in the form of an affidavit from one Terrence Heywood (*see* Appendix A).

5. On November 29, 1993, defendant moved for summary judgment in the court below based upon the People's failure to respond to his August 9, 1993 motion.

6. Sometime after August 9, 1993, the court below denied defendant's motion to vacate his judgment of conviction in an oral decision issued from the bench.

7. I have searched all three of defendant's appellate files, maintained within the Queens County District Attorney's Office, and I was not able to find copies of the August 9 or November 29, 1993 motions.

8. I have also searched the file cards, maintained by my office, on which defendant's entire appellate history is recorded and can find no mention of August 9 or November 29, 1993 motions.

9. Accordingly, I can only conclude that the defendant failed to serve the People with a copy of his August 9 and November 29, 1993 motions. Significantly, defendant's Affidavit of Service By Mail states that defendant mailed a copy of his August 9, 1993 motion to the court, but it does not list the Queens District Attorney's Office as a recipient (*see* Appendix A).

10. The court below properly denied defendant's August 9, 1993 motion to vacate his judgment of conviction because it was procedurally barred and meritless. Moreover, because

defendant's claims were procedurally barred, the trial court properly denied his motion to vacate the judgment of conviction on its face, and no response in opposition by the People was required.

11. Attached is a Memorandum of Law further showing the propriety of the trial court's denial of defendant's August 9, 1993 motion to vacate judgment.

WHEREFORE, defendant's motion for an order under Article 78 in the Nature of a Writ of Mandamus should be denied.

Dated: Kew Gardens, New York
December 2, 1994

s/ Eric Rothstein
Eric Rothstein
Assistant District Attorney
(718) 286-6602

TO: Sherman Walker
92-A-7141 / B14-23
Box 500
Elmira, New York 14902

Affirmation in Opposition Dated December 2, 1994

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Queens County
Indictment numbers
6542/89, 2119/91,
2120/91

AD #s: 93-05226,
92-02880, 92-01662

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

SHERMAN WALKER,

Defendant.

MEMORANDUM OF LAW

Affirmation in Opposition Dated December 2, 1994

POINT ONE

DEFENDANT'S 440 CLAIMS WERE PROCEDURALLY BARRED BECAUSE DEFENDANT FAILED TO RAISE HIS CURRENT CLAIM IN ANY OF HIS TWO PRIOR MOTIONS TO VACATE JUDGMENT.[1]

Although defendant claimed in his motion to vacate judgment that Terrence Heywood's affidavit represents new evidence that merits a new trial, defendant did not raise these claims in any of his two prior motions to vacate judgment. Thus, absent a showing that defendant was not in a position adequately to raise these claims — a showing that defendant did not make — the trial court properly denied defendant's motion to vacate judgment on this ground. *See* C.P.L. §440.10(3)(c). Significantly, Terrence Heywood's affidavit is dated December 26, 1992, a full five months before defendant filed his second motion to vacate the conviction (*see* Appendix A).

---

1. Defendant's claim that the trial court improperly denied his motion to vacate judgment because the prosecution did not file a response in opposition is baseless. First, as shown in the accompanying affirmation, the People were not properly served by defendant with his motion papers; consequently, they cannot be penalized for failing to respond. Second, as shown herein, the claims raised by defendant in his motion to vacate judgment were procedurally barred. That being the case, the trial court was justified in denying defendant's motion on its face — with, or without opposition papers from the People. Criminal Procedure Law § 440.10(3)(a), (b).

Affirmation in Opposition Dated December 2, 1994

Accordingly, this Court should summarily deny defendant's current application.

POINT TWO

DEFENDANT'S 440 CLAIMS WERE PROCEDURALLY BARRED BECAUSE HE UNJUSTIFIABLY FAILED TO PLACE FACTS ON THE RECORD THAT WOULD PERMIT APPELLATE REVIEW OF THE CLAIM.

Defendant's motion to vacate his judgment of conviction, based upon his new evidence claim, was properly denied by the trial court because he could have put facts in support of this claim on the record at trial but unjustifiably failed to do so. Criminal Procedure Law Section 440.10 (3) (a) provides that the court may deny a motion to vacate judgment where the defendant could have, with due diligence, put facts on the record in support of his claim so as to permit appellate review, but unjustifiably failed to do so. Thus, for example, in *People v. Friedgood*, 58 N.Y.2d 467, 471 (1983), the Court of Appeals held that the court properly denied the defendant's motion to vacate the conviction because he failed to show that he used due diligence in trying to adduce, at trial, facts to support his claim that the prosecutor had used allegedly coercive tactics.

Here, although Terrence Heywood's name is listed in the police reports attached to defendant's motion, defendant failed to assert his claim at trial, or in a motion to set aside the verdict, that Heywood was not a confidential informant.

In sum, because defendant failed to place facts on the record to allow appellate review of his claim, the trial court properly denied his claim.

POINT THREE

BECAUSE DEFENDANT KNEW ABOUT TERRENCE HEYWOOD BEFORE TRIAL, HEYWOOD'S AFFIDAVIT DID NOT CONSTITUTE NEWLY DISCOVERED EVIDENCE.

Defendant knew about Terrence Heywood's existence before trial and thus, Heywood's affidavit did not represent newly discovered evidence within the meaning of C.P.L. § 440.10(g). First, defendant knew about the evidence before trial. Indeed, defendant attached two police reports to his August 9, 1993 motion which delineate Heywood's limited involvement in the case. Furthermore, the fact that Heywood alleges that he never spoke to the police is irrelevant to defendant's case. Indeed, Heywood never testified at either of defendant's trials. How the police came to regard defendant as a suspect had no bearing on his guilt or innocence. Once the police had defendant's name, the eyewitnesses selected his photograph from a series of pictures, thereby providing the necessary probable cause to arrest defendant. Thus, defendant's alleged newly discovered evidence is not material, and there is no possibility that defendant's alleged newly discovered evidence would result in a different verdict at a new trial. *People v. Salemi*, 309 N.Y. 208 (1955); *cert. denied*, 350 U.S. 950 (1956). Accordingly, defendant's motion to vacate judgment was meritless and properly denied.

Affirmation in Opposition Dated December 2, 1994

CONCLUSION

FOR THE AFOREMENTIONED REASONS, THIS COURT SHOULD SUMMARILY DENY DEFENDANT'S CURRENT MOTION.

Dated: Kew Gardens, New York
December 2, 1994

Respectfully submitted,

RICHARD A. BROWN
District Attorney
Queens County

GARY FIDEL
ERIC ROTHSTEIN
Assistant District Attorneys of Counsel

Affirmation in Opposition Dated December 2, 1994

APPENDIX A

REQUEST FOR JUDICIAL INTERVENTION

SUPREME (COUNTY) COURT, QUEENS COUNTY

* * *

FULL TITLE OF ACTION

In the Matter of Application of Sherman Walker,
For a Judgment Pursuant to Article (22)
of the Civil Practice Law & Rules

Plaintiff(s)
Petitioner(s)

– against –

The People of the State of New York

Defendant(s)
Respondent(s)

Name of Assigned Judge:
Hon. Lawrence J. Finnegan

* * *

Affirmation in Opposition Dated December 2, 1994

NATURE OF JUDICIAL INTERVENTION (check)

* * *

_X_ Order of show cause (return date _____)

Relief sought: TO COMPEL JUDGE TO RULE vacate prior order and vacate judgment of conviction

* * *

NATURE OF ACTION OR PROCEEDING (check)

* * *

SPECIAL PROCEEDINGS

* * *

Article (78) reargue/renew CPLR

* * *

In the City of New York only:

_X_ The City of New York is a party to this action.

* * *

Affirmation in Opposition Dated December 2. 1994

Sherman Walker
Attica C.F.
Attica, New York 14011
149 [B&C 92A7141, B-14-28]

Date: Aug 9, 1993.

New York State Supreme Court
Queens County, Crim. Term (K-9)
125-01 Queens BLVD.
KEW GARDENS, New York 11415

Re: CPLR 2221 Reargue/Renew
Motion to Vacate Judgment,
Ind. No. 6542/89, 2120/91, 2119/91

Dear Court Clerk:

Please find enclosed is the appropriate application for an order to show cause and supporting papers.

Please deliver these papers to Hon. LAWRENCE J. FINNEGAN, JR., for consideration.

Thank you.

Respectfully submitted

s/ Sherman Walker
SHERMAN WALKER
Pro-Se — thus far

Affirmation in Opposition Dated December 8, 1994

Enclosures:

Order to Show Cause
Affidavit in Support of Order to Show Cause
Affidavit in Support of Motion to Vacate Judgment
Affidavit of (Terrence Heywood) in Support Thereof
Motion to Proceed as a Poor Person

Affirmation in Opposition Dated December 2, 1994

Present. Hon. _____ Justice

SUPREME COURT OF THE STATE OF NEW YORK

RI#
Index No. _____

In the Matter of the Application of Sherman Walker,

Defendant,

For a judgment pursuant to Art. 22 of the
Civil Practice Law and Rules

— against —

The People of the State of New York

Respondent

Order to show cause granting leave to reargue vacating prior order and vacating judgment of conviction

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The Motion of Sherman Walker respectfully alleges that:

This is a special proceeding brought pursuant to Article (22) of the Civil Practice Law and Rules.

Affirmation in Opposition Dated December 2, 1994

Upon the annexed affidavit of Sherman Walker, Sworn to on the __ day of _____, 199__, and the annexed affidavit in support of order to show cause and the appropriate moving papers, and all the proceeding previously held in regard to this matter the court being satisfied with the truth of the facts alleged and it appearing that the defendant may have good cause of action to vacate judgment of conviction of the Supreme Court of New York State, Queens County and Pursuant to CPLR 2221 for leave to reargue his motion pursuant to Article 440 of the criminal procedure law vacating said order of denial.

Now on motion of the defendant, Sherman Walker, it is

ORDERED, that defendant, Sherman Walker, be permitted to prosecute this proceeding as a person against the people of the State of New York and it is further

ORDERED that Alden T. Lewis, ESQ. be and hereby is assigned to defendant as the attorney whose duty it shall be to conduct said proceeding free of charge to defendant pursuant to CPLR 1101. Whose duty it shall be to conduct oral argument and to conduct an evidentiary hearing and that Pursuant to CPLR 1102, that a copy of the stenographic transcripts of either proceeding be provided to the defendant and assigned counsel, and it is further

ORDERED that the motion be and the same is here by in all respect granted and the leave to reargue defendant's 440.10 motion for vacating the judgment of his conviction be and the same is hereby granted, and it is further

Affirmation in Opposition Dated December 2, 1994

ORDERED that the order of Mr. Justice FINNEGAN, entered and filed in the above entitled action on the 28 day of June, 1993, denying the motion of the defendant for vacating judgment of conviction be and the same is hereby vacated and set aside, and it is further

ORDERED that this proceeding may be commenced by the service by mail and that service of a copy of this order to show cause, together with a copy of the papers upon which it was granted, by mail, upon the District Attorney Office on or before the __ day of _____, 199__, be deemed sufficient service, and it is further

ORDERED that the Clerk of this Court be hereby is directed to make no charge for cost or fees to defendant in connection with the prosecution of this action, and he further be directed to enter the index number and to conform all copies of defendant legal papers in this action, to be served on defendant behalf all necessary copies the order to show cause, affidavit in support of order to show cause to vacate said order and conviction and any or all other documents previously filed in connection with this proceeding by defendant that defendant would otherwise be required to serve upon the District Attorneys Office, and to return a conformed copy of the order to show to defendant, and it is further

Let the Respondents show cause before Motion Term (K9) of the Supreme Court of Queens at the courthouse there of, on the __ day of _____ 199__, at O'clock in the forenoon of that day or as soon thereafter as counsel can be heard why an order vacating the prior order and vacating judgment of

conviction should not be made pursuant to CPLR 2221(9) in accordance with CPL 440.10 granting the (defendant) the relief requested in the sworned annexed affidavit hereto

ENTER.

DATED:

_____

JUSTICE OF THE SUPREME COURT

Affirmation in Opposition Dated December 2, 1994

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS, MOTION TERM (K-9)

RJI #
Index No. _____

In the matter of the application of
Sherman Walker,

defendant,

For a judgment Pursuant to Art. 22 of (CPLR)

— against —

The people of the State of New York,

respondent.

Affidavit in support of order to show cause

STATE OF NEW YORK)
COUNTY OF WYOMING) SS

I Sherman Walker, upon being duly sworn depose and says:

I am the defendant in the above entitled proceedings.

1) I make this affidavit in support of my Motion pursuant to Art. 22 of CPLR and CPL 440 arguing that this court reversed itself and vacate the order made on the 28 day of June, 1993, denying defendant CPL 440.10 motion, that said

order be annulled and that the court rule on the law as defendant has outlined previously in his motions pursuant to CPL 440.10 as such decision was certainly prejudicial to defendant case that is shocking to ones sense of fairness.

2) Defendant is using an order to show cause because he is incarcerated and can not arrange to have a motion personally delivered to the Respondent.

3) Defendant designate Queens County as the place of trial the basis of the VENNE is that Queens County is the judicial district in which the material events took place.

No previous application for the same or similar relief herein prayed for has been made.

Wherefore, your defendant respectfully ask for an order vacating the prior order, and vacating judgment of conviction, and directing respondent, District Attorney Office to show cause why the defendant should not be granted fully, his motion pursuant to 440.10 in accordance with the controlling law outlined in the memorandum of law under Point (A) and (B) in the defendant's motion, and why such other and further relief as may be just and proper should not be granted.

Affirmation in Opposition Dated December 2, 1994

Respectfully submitted

s/ Sherman Walker
Sherman Walker
Attica Corr. Fac.
Attica, N.Y. 14011

Sworn to before me this 28 day
of July, 1993.

Commissioner of Deeds

ROBERT L. BAYLISS
Notary Public, State of New York
Qualified in Wyoming County
My Commission Expires April 23, 1994

s/ Robert L. Bayliss

Affirmation in Opposition Dated December 2, 1994

SUPREME COURT STATE OF NEW YORK
COUNTY OF QUEENS, MOTION TERM (K9)

Ind. No. 6542189
2120191
2119191

Sherman Walker,

— against —

The People of the State of New York

Respondent.

Affidavit in support of Motion to Vacate Judgment of conviction and vacate prior order and order a new trial; or an alternative order or hearing with defendant present with the assignment of counsel

STATE OF NEW YORK)
COUNTY OF WYOMING)

Sherman Walker being duly sworn, deposes and says:

1) I am the defendant if the above entitled action and am fully familiar with all the facts and circumstances heretofore had herein.

2) Although I am fully familiar with all the facts hereinafter stated to the best of my knowledge, information and belief, I am a lay person in areas of the law and seek this court's

indulgence for error or fault, pursuant to Sec. 2101(f) of the CPLR of the State of New York.

PROCEDURAL HISTORY

(3) On Jan. 30, 1992, the defendant was convinced after a jury trial of robbery in the Second Degree and sentenced to seven to fourteen years, imprisonment under Ind. No. 6542/89 (Beerman, J.) On June 6, 1992, the defendant was sentenced to seven to fourteen years, imprisonment of acception a sentencing requirement to robbery in the first degree under Ind. No. 2120/91 (Beerman, J.) to run concurrent with Ind. No. 6542/89 with leave to appeal.

(4) On Feb. 8, 1993 the defendant's prior motion to proceed in forma pauperis and to vacate judgment was denied by Justice Finnegan because of the District Attorney office misstatement of facts. (see, order attached as Exhibit (1)). The defendant then renewed his application to vacate judgment on or about May 27, 1993 Based on the following grounds:

POINT A
The prosecutor failed to turn over all prior statements made by a complainant in a timely fashion violated the defendant rights under Rosario and Brady.

POINT B
The defendant was denied effective assistance of counsel because of various grounds to on the record.

(5) Said motion resulted in a decision by Mr. Justice FINNEGAN denying the motion, Thereafter an order denying

the defendant's motion was entered and filed on the 28 day of June 1993. (See copy of order attached as Exhibit (2)).

(6) The defendant now submits this affidavit pursuant to CPLR section 2221 and in accordance with CPL 440.10 for an order vacating the prior order and vacating judgment of conviction with a new trial and suppression hearing in that errors were committed against him under the provisions of Sec. 440.10 Subd. 1 (b), (d), (f), (g) and (h) of New York State Criminal Procedure Law.

BASIS FOR VACATING PRIOR ORDER
AND JUDGMENT OF CONVICTION

(7) That the court over looked certain critical facts and principles of Law previous stated in the defendant motion under Brady and Rosario and that his trial counsel was ineffective.

A) That ADA committed misconduct when he deliberately failed to (timely) inform the court and defense that both identification was tainted in violation of the defendant rights, under Ind. No. 6542/89 and 2120/91.

B) That trial counsel failed to adequately call the court's attention to violation of principles of law and unaddress facts before the court.

The defendant asserts the grounds established in his motion constitute the basis for this court to vacate the prior order is all built around the rule under which an court applies the law as it exist. *See*, CPLR commentary 2221:8 and binding on the court to vacate said order.

Affirmation in Opposition Dated December 2, 1994

Despite the previous determination however, the court should in the interest of justice and the fact that good cause been shown grant the motion. (See CPL 440.30 Subd. (1) and Subd (2), (3), Pat. a,b,c,.

ANALYSIS OF COUNSEL ERRORS UNDER
Ind. No. 6542184, 2120191

(8) I can understand the jury's thinking that I was guilty under Ind. No. 6542/89. I can also understand why the court denied the pre-trial motion under Ind. No. 2120/92 because my trial attorney, Steven Greenfield made no attempt to properly investigate the case.

Mr. Greenfield, who has his office in 12 Melbourne Rd., Great Neck, NY 11021, and was assigned by the court pursuant to 18-B to represent me on or about October 1991.

I first saw Mr. Greenfield, in Oct. 1991, in the "Pens" at the courthouse when he simply introduced himself to me. In Nov. I saw him in court briefly. On a couple of other occasions, when a court appearance was scheduled, I saw him in the pens for no more them five minutes at a time. He was in a hurry all the time and just said "don't worry".

I had other visits in the court pens with Mr. Greenfield during trial times, that lasted about half an hour also. He didn't take notes of what I said then either. He said he would look into matters that need to be investigated soon, that Mr. Greenfield would always be in a rush.

Affirmation in Opposition Dated December 2, 1994

ADDITIONAL ERRORS OF COUNSEL UNDER IND. NO. 2119/91 and SUMMARY STATEMENT

(9) On March 1992 the case was indicated ready for trial before this court under instant indictment.

At the trial held in connection with the instant matter, detective James Redmond, Shield No. 2970 command, Queens robbery squad, testified that he had arrested Mr. Walker and conducted a lineup which Mr. Walker was selected by the complainant and not selected by the witness.

The evidence included: testimony of an eyewitness and complainant witness making the complainant first, testified to his identification made on Mar. 21, 1991 then of the events of the incident. A witness to the alleged incident testified also for the prosecution case that she was unable to identify anyone at the lineup proceeding although there was testimony allowed that she had stated during a photo selection conducted by detective Redmond that Mr. Walker photo only "looked like the suspect".

Based largely upon the foregoing facts, the jury convicted the defendant Walker believing he had committed the crimes of robbery in the third degree and the court dismissed count one robbery in the first degree based on a trial order of dismissal.

****

(10) This affidavit is made both upon personal knowledge and upon information and belief, the source of my knowledge

and basis for my belief being (1) a personal interview I had with Mr. Greenfield, Esq. after the trial which resulted in a judgment of conviction while in the court pen area, Mr. Greenfield told me the acting assistant district attorney by the name of Baptista provided him with two unredacted DD#s reports No. (2) and (3) attached to this affidavit as defendant exhibit (3) of a pretrial interview conducted by Det. Frank Favilla from the M.T.S. pct. and Det. Russo from the 84 R.I.P. in B'klyn, (2) Mr. Greenfield, acknowledged that while this information should have been produced at or prior to trial in that nothing contained therein was confidential, he had only received the unredacted reports in question by a DA, Baptista based on his request of any Rosario and Brady material at trial under Ind. No. 2119/91.

(11) I do remember indicating to Mr. Greenfield that there does seem to be a contradiction in the unredacted DD5 report No. (3) write up in that the indication of the alleged confidential informant now known as Terrence Heywood N.Y.S.#5537997P shows that A.DA McRath improperly withheld the identity and history of the so-called informer.

(12) I had told Mr. Greenfield that this so-called informer was a person I believed to be from the neighborhood, and that its possible he could be located, interviewed and brought to court. I did urge Mr. Greenfield to assist me in checking into this crucial information. I thought that it would make a difference in the case.

Counsel did not request an adjournment or continuance for the purpose of investigating the circumstances surrounding the DD#5, even though at the time he received it its significance

had already been high lighted at the Wade hearing to the effect that the prosecution McRath did only disclose part of the information contained in the DD5 ( ) and (3) although the so-called informer identity and history had been wrongfully withheld.

Mr. Greenfield, knew of this revelation and neglected to investigate it thereby making it impossible for efforts to be made to secure the attendance of this person at the appropriate time before the court (see, the provision under CPL 240.40, 240.50, 60.15(1); also, 620.20(1)(a).

(13) Some time later after the defendant's conviction, with the help of friends and relative's search and assistance looking into this matter, the defendant was able to obtain an affidavit from the so-called informant. (See attached hereto as Exhibit 4). It was discovered that Terrance Haywood resided at 106 Howard Ave., B'klyn, NY 11233, Apt. 2L, that Mr. Haywood had acknowledged being only familiar with the defendant being a old class mates and from occasionally seeing the defendant around the neighborhood; that Haywood personally read the DD#5's (2) and (3) write ups and denied acknowledging the events described therein as to the truth; he stated that he had never been interviewed by Det. Redmond on Jan. 15, 1991 and that he had not informed against the defendant.

(14) The primary contentions of the defendant in this branch is that his due process rights were deliberately violated by counsel because: In that Mr. Greenfield, awareness of the new unredacted DD#5 report No. (3) created an affirmative duty on counsel to seek out an order to set aside the judgment

based on this crucial information alternatively defense counsel should have made substantial enough effort to locate this material witness. With respect to this discovery during the appropriate stages and that counsel did not fulfill his responsibilities with respect to investigation this new information about the informant alleged identity and history. His whereabouts, and information; *such failure by counsel amounted to ineffective assistance of counsel and violated the defendant's due process as well as equal protection rights of the law.*

(15) The defendant argue that Mr. Greenfield had only informed him that the undisclosed information in the unrelated new DDs report No. (3) would not have made a difference in the outcome of the trial and advised me simply to appeal my conviction. Counsel had not explained that the people's failure to provide the material would entitle the defendant to a reversal of his conviction and a new trial.

Moreover, the defendant argues further that Mr. Greenfield had not properly advised him of the legal effects of the assistant D.A.'s non-disclosure and that *the failure of his counsel to communicate adequately with him amounted to ineffective assistance of counsel.*

(16) Since the right to the effective assistance of counsel is guaranteed by both the state and Federal constitutions (N.Y. const., Art. 1, 86; U.S. Const., 6th Amendment), the defendant respectfully submits that under all the circumstances presented by this case he did not receive adequate or effective representation in any meaningful sense of those words by his prior counsel, Steven Greenfield, Esq.

Affirmation in Opposition Dated December 2, 1994

Since meaningful and adequate representation requires that counsel guard against inadmissible evidence and that counsel understand basic principles of criminal law (People v. Brown, 45 N.Y. 2d 852, 410 N.Y.S. 2d (1978) The facts and Law applicable thereto are set forth to show that prior counsel's failure to investigate and all appropriate substantive defense, both at pre-trial and trial, and his failure to master all of the facts relative thereto, resulted in the deprivation of defendant right to effective assistance of counsel.

(17) The defendant urges the court to direct further investigation into the background of this evidence. Based on the new facts and old alike, the annexed exhibits and previous memorandum of law submitted in support of this motion, the court shall vacate the convictions and order a new trial on the facts and law. See CPL 440.30 (3)(a)(b); or, order an evidentiary hearing with presence of defendant and assignment of counsel, See, CPL 440.30(5)(6).

Any replies or answer by the people must be supplied to the defendant at least eight (8) days prior to any hearing date scheduled and allow defendant to respond, CPLR 2214(b).

Wherefore for the foregoing reasons the relief requested must be granted defendant with a new trial; or a hearing with his presence and assignment of counsel.

Affirmation in Opposition Dated December 2, 1994

Dated: Respectfully submitted

s/ Walker, Sherman
Sherman Walker
Pro Se

Sworn to before me this 28th day of July, 1993.

Commissioner of Deeds

ROBERT L. BAYLISS
Notary Public, State of New York
Qualified in Wyoming County
My Commission Expires April 23, 1994

s/ Robert L. Bayliss

Affirmation in Opposition Dated December 2, 1994

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM PART (K-9)

Ind. No. 6542/89
2120/91
2119/91

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

– against –

SHERMAN WALKER,

Defendant.

Memorandum of Law
In Support of Motion
To Vacate Judgment

MEMORANDUM OF LAW

INTRODUCTION:

Point B.

All criminal defendants are guaranteed the right to effective assistance of competent counsel at both the pre-trial, trial and on appeal. *See, Strickland v Washington*, 466 U.S. 668 (1984); *United States vs. Cronic*, 466 U.S. 648 (1984); *EVITTS vs. LUCEY*, 469 U.S. 387 (1985); *People vs. Baldi*, 54 N.Y.2d 13; *People v. Sims*, 55 A.D.2d 629.

Affirmation in Opposition Dated December 2, 1994

The defendant will now address the meaningful representation standard of Baldi adopted in People vs. VEZZA, 89 A.D.2d 882 to review the attorney's effectiveness. The VEZZA standard is applicable to the instant case to warrant a reversal of this conviction due to ineffective assistance of counsel at both level of the proceeding(s).

[Attached hereto for this Court consideration Exhibit "A-( )"].

The defendant is relying principally upon *People vs. VEZZA*, 89 A.D.2d 882, 453 N.Y.S.2d 216 at p. 217 for a reversal of his conviction. In *VEZZA* the panel recognized the failure(s) of defense trial counsel to accord meaningful representation to the defendants before and at trial. At bar defendant here argues that the level of the failure(s) of his defense counsel, Mr. Greenfield, are much more unique than the failure(s) outlined in VEZZA. However, the standard the Court applied to *VEZZA* case is applicable to the present case, against which Mr. Greenfield's effectiveness can be measured before this court. A *VEZZA* problem is evident in the instant case. In both, cases, the facts of Counsel failure(s) were serious and several. In both case(s) the identification were the primary issue. In both case(s) the cumulative effect of the failure(s) reached errors of such a nature to deprive the defendant of the effective assistance of Counsel(s).

Affirmation in Opposition Dated December 2, 1994

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE JUDGMENT OF CONVICTION, SHOULD BE REVERSED AND THE INDICTMENTS DISMISSED; IN THE ALTERNATIVE, THERE SHOULD BE A REMAND FOR A NEW AND FAIR TRIAL.

Dated: August 6, 1993
Attica C.F.
Attica, New York 14011-149

Respectfully

s/ Sherman Walker
Pro-Se

Affirmation in Opposition Dated December 2, 1994

EXHIBIT A(1)

SUPREME COURT — STATE OF NEW YORK
CRIMINAL TERM PART K-9 QUEENS COUNTY
125-01 QUEENS BOULEVARD,
KEW GARDENS, N.Y. 11415

PRESENT:

HONORABLE LAWRENCE J. FINNEGAN, JR.
JUSTICE

Ind. No. 6542/88 and 2120/91

THE PEOPLE OF THE STATE OF NEW YORK

– against –

SHERMAN WALKER,

Defendant.

Motion to Proceed in Forma Pauperis
and to Vacate Judgment

Submitted 12/21/92

Affirmation in Opposition Dated December 2, 1994

The following papers numbered 1 to
submitted in this motion

Sherman Walker, Pro Se
For the Motion

John M. Castellano, A.D.A.
Opposed

	Papers Numbered
Notice of Motion and Affidavits Annexed	1 – 2
Answering and Reply Affidavits	3 –

* * *

For the reasons stated in the People's response in opposition to defendant's motion to proceed in *forma pauperis* and to vacate judgment of conviction, said motion is denied.

This constitutes the decision, opinion and order of the court.

Order entered accordingly.

s/ Lawrence J. Finnegan, Jr.
LAWRENCE J. FINNEGAN, JR.

Dated: February 8, 1993
Gloria D'Amico

Affirmation in Opposition Dated December 2, 1994

EXHIBIT A(2)

SUPREME COURT — STATE OF NEW YORK
CRIMINAL TERM PART K-9 QUEENS COUNTY
125-01 QUEENS BOULEVARD,
KEW GARDENS, NY 11415

PRESENT:

HONORABLE LAWRENCE J. FINNEGAN, JR.
JUSTICE

Ind. No. 6542/89
2120/91

THE PEOPLE OF THE STATE OF NEW YORK

– against –

SHERMAN WALKER,

Defendant.

Motion to Vacate Judgment of Conviction

Submitted 5/27/93

Affirmation in Opposition Dated December 2, 1994

The following papers numbered 1 to
submitted in this motion

Sherman Walker, Pro Se
For the Motion

John M. Castellano, A.D.A.
Opposed

	Papers Numbered
Notice of Motion and Affidavits Annexed	1 – 2
Answering and Reply Affidavits	3 –

* * *

Upon the foregoing papers, the defendant's motion to vacate judgments of conviction is denied (CPL 5440.10(2)(b); (3)(b)).

Order entered accordingly.

The clerk of the court is directed to mail a copy of this order to the defendant's place of incarceration and to the District Attorney.

s/ Lawrence J. Finnegan, Jr.
LAWRENCE J. FINNEGAN, JR.

Dated: June 28, 1993

Affirmation in Opposition Dated December 2, 1994

EXHIBIT A(3)
DD# NO. (2) AND (3)

EXHIBIT NO. 2

Robbery

1/14/91

* * *

DETAILS

Investigate: JEWELRY STORE ROBBERIES

Subject: CONFERRAL WITH P.O. FRANK FAVILLA, MTS RIP

1. On 1/14/91 the assigned conferred with P.O. Frank FAVILLA, M.T.S. RIP re: information pertaining to Jewelry store robberies. He related that In addition to names supplied previously by Det. CARUSSO he gave the assigned the following names: Thomas PHILIPS nysid#6604061Z, Trid TIMMINS, AKA BOON NYSID# 6487288Y, William JOHNSON aka WRIGHT NYSID# 5204544N, Heath NEWKIRK NYSID#5577521Y, Steven BUMBRY NYSID# 6784214Q, Steven MURPHY NYSID#6784459 and Fred PETERSON Nysid# 6784320M. That these subjects have committed Jewelry store robberies in Manhattan and may have committed same in Queens Area. He also provided me with the name of Terrence HEYWOOD, NYSID# 5537997P who is currently confined to CoN.C. Correctional Facility BRIG and may be able to confer with.

2. Case Active

Affirmation in Opposition Dated December 2, 1994

CASE
☒ ACTIVE ☐ CLOSED

DATE REVIEWED/CLOSED
1/15/91

IF ACTIVE, DATE OF NEXT REVIEW
1/21/91

REPORTING OFFICER

RANK
DET

SIGNATURE
s/ James P. Redmond

NAME PRINTED
James P. REDMOND

TAX REG. NO.
860006

COMMAND
QRS

REPORTING/CLOSING
SUPERVISOR
s/ [illegible]

SIGNATURE
s/ [illegible]

* * *

Affirmation in Opposition Dated December 2, 1994

EXHIBIT NO. 3

1/15/91

* * *

Investigate: JEWELRY STORE ROBBERIES

Subject: DEBRIEFING OF TERRENCE HEYWOOD

1. On 1/15/91 the assigned in the company of Det. Roy MARTINO where present at N.Y.C. Correctional Facility, Brig institution and interviewed subject Terrence HEYWOOD. He related that the below named persons are responsible for numerous Jewelry store type robberies, in the boro of Queens, Areas of Steinway Street, Myrtle aves and Jamaica ave. over the past two years. The head of ring is Sherman WALKER who's associates are Tony PARKER, Troy "JARED" TIMMINS, SHARAD MORANT, William WRIGHT, Thomas PHILIPS, Trid "BOON" TIMMINS, William "WRIGHT" JOHNSON, Heath NEWKIRK, Steven BUMBURY, Steven MURPHY, Fred PETERSON (these subject he identified by photo. Others that no photos had been obtained where TANGT MORANT, & TRACY. Sherman Walker has all the guns and plans the robberies. Mr. HEYWOOD stated he is only requesting that I confer with his attorney Mr. D'MARCO, B'klyn. Legal Aide 732-5000, ext. 513. and The prosecuting A.DA. of Manhattan Mr. SILVERBERG 212-335-9237. Upon Completion of interview subject requested some money and ten dollars was put into his commisary fund.

2. Case Active

Affirmation in Opposition Dated December 2, 1994

CASE
☒ ACTIVE ☐ CLOSED

DATE REVIEWED/CLOSED
1/15/91

IF ACTIVE, DATE OF NEXT REVIEW
1/22/91

REPORTING OFFICER

RANK
DET

SIGNATURE
s/ James P. Redmond

NAME PRINTED
J. P. REDMOND

TAX REG. NO.
860806

COMMAND
QRS

REPORTING/CLOSING
SUPERVISOR
s/ [illegible]

SIGNATURE
s/ [illegible]

* * *

Affirmation in Opposition Dated December 2, 1994

EXHIBIT (4)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF *NEW YORK*: Part 78

IND. NO. 338
#91

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

— against —

SHERMAN WALKER

Defendant.

Affidavit in Support of Motion for A New Trial

STATE OF NEW YORK)
County of *New York*) SS.:

I, *Terrence Heywood*, being duly sworn deposes and say that:

I reside at 106 Howard Avenue, Brooklyn, New York 11233.

1. I state that presently I made this affidavit without threat or fear of my liberty in support of Sherman Walker's motion for a new trial.

Affirmation in Opposition Dated December 2, 1994

2. I state that I do not personally know, Mr. Walker, or have associated with him in the past. However, I do acknowledge attending the same public school with Mr. Walker in the past, and only know we are from the same neighborhood.

3. I state, that I have previously conferred with a member of, Sherman Walker's family with regards to the statements contained in the two Police reports marked as Mr. Walker Exhibit (A) and (B) along with the transcripts of a Wade hearing minutes marked as Mr. Walker Exhibit (c) I believe; for which I am the subject of discussion contained therein.

I further state, I am the subject referred to in the Police interview reports in that the NYSID# 5537997P clearly matches the NYSID# NO. contributed to me.

4. I have been arrested before in the past. Although I have never been arrested by a Detective Frank Favilla, Shield #2048, of the M.T.S., R.I.P. till this present day. I do not personally know Detective Frank Favilla, Shield #2048, nor have I carried out any informant work for any member of the Police Department in the past. In that I am not a confidential informant with a Registered Number that has or have worked for Detective Frank Favilla, Shield #2048, in the past.

5. Further I do not personally know a Detective Redmond, Shield #2970, of Queens' Robbery Squad. Neither have I met with Detective Redmond on Jan. 15, 1991, at the N.Y.C. Correctional Facility, Brooklyn Brig, or informed him of any information of any kind against Mr. Walker in compliance with Detective Frank Favilla, Shield #2048, as indicated in

Affirmation in Opposition Dated December 2, 1994

Mr. Walker Exhibit (A) and (B), transcribed by Detective Redmond, Shield #2970.

6. I made the above determination when I actually observed the Police reports describing substance of this information. That this information transferred by Detective Frank Favilla, Shield #2048, of the M.T.S. R.I.P. Precinct was false and known by the detective to be false.

7. I swear that the aforementioned facts are true under the penalty of perjury.

Respectfully submitted

s/ Terrence Heywood
Terrence Heywood

Sworn to before me this
26th day of December, 1992.

s/ Pedro Escrogima
PEDRO ESCROGIMA
NOTARY PUBLIC, State of New York
Qualified in New York County
Commission Expires December 31, 1994

Affirmation in Opposition Dated December 2, 1994

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS PART(K9)

Index No. _____

In the matter of the application of
Sherman Walker,

For permission to proceed as poor person.

Petition to proceed as a poor person

TO THE SUPREME COURT OF THE STATE OF NEW YORK. COUNTY OF QUEENS:

The application of Sherman Walker respectfully shows to this court:

That the defendant is a prisoner of the state of New York presently detained at Attica Corr. Fac. Attica New York 14011-149. That the defendant is about to commence an action for judgment, annulling a determination of the Supreme Court, pursuant to Art. 22 of the CPLR and Art. 440 of the CPL.

That the defendant makes this application in the County of New York pursuant to Art. 5 of the Civil Practice law and rules because it is the county in which the respondent has its principal office and facilities and made the determination complained of in this action.

That the defendant makes this application pursuant to Sec. 1101 and 1102 of the CPLR upon the grounds that he is

unable to pay the cost, fees and expenses necessary to prosecute this action.

That the defendant will be unable to prosecute this action unless permitted to do so as a poor person.

That the defendant is fully cognizant of the fact that the attorney assigned by the court herein will serve without compensation.

That the defendant does not know of any attorney who is willing to represent him in this proceeding, and therefore desires that an attorney of competent experience be assigned to represent the defendant in this proceeding without compensation.

I believe that I am not able to do an adequate job of representing myself in the above entitled proceeding because: The legal issues are complicated and I don't know how to support my petition on the law; and there are other witnesses who are potential witness on my behalf but I cannot get in touch with then while I am in prison.

Defendant is fully aware that he does not have a right to counsel for the purposes of assistant on his motion papers purposes of assistant on his motion papers pursuant to Art. 440, however, he seeks this court indulgents on any error or should an evidentiary hearing be granted, he seeks the assignment of counsel.

That the defendant does not have the freedom or opportunity to insure timely service of all necessary documents upon the

respondent of the State of New York, and therefore desire that the clerk of court or some other responsible person be assigned to serve on his behalf.

Wherefore, the defendant prays that he be permitted to prosecute this action against respondent, as a poor person, and prays that the court assign the clerk of the court or some other responsible person to enter the index number and conform all copies in this proceeding, to serve all the necessary documents on his behalf, and to return one conform copy of each document to defendant.

Respectfully submitted

s/ Sherman Walker
Sherman Walker

Sworn to before me this __ day of _____ 199__

Affirmation in Opposition Dated December 2, 1994

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Index No. _____

Sherman Walker,

Petitioner,

– against –

The people of the State of New York

Respondent

Affidavit in support of petition to
proceed as a poor person

State of New York)
County of WYOMING) SS.:

Petitioner moves the court to use its discretionary power under 18 USC Sec. 300 6 ALG), the CPLR Sec. 1101 and 1102 to appoint counsel to represent him in the above entitled case.

I am the defendant in the above captioned case, and I make this affidavit in Support of the annexed petition to proceed in forma pauperis.

I am present in the custody of the Anthony F. Zon of Attica Corr. Fac. Attica N.Y. 14011-149, pursuant to a judgment

of the Supreme Court of the State of New York, Queens County, rendered Jan. 30, Mar. 30, June 6, 1993 convicting me of robbery in the first degree, on one case, robbery in the second, and robbery in the third degree separately as to each indictment, ultimately the defendant was sentenced to seven to fourteen years imprisonment.

I am unable because of my indigent status, to pay the costs, fees and expense necessary to prosecute this action. I am currently incarcerated and earning nothing. And I own no property. No other person has a beneficiary interest in the outcome of this action.

I believe in good faith that I am entitled to the relief that I am seeking in this case.

Wherefore, I respectfully ask for an order permitting me to prosecute this action as a poor person, that I be furnished with a copy of the stenographic transcript of this proceeding without fee, should an evidentiary hearing be ordered, and that I be assigned an attorney to represent me on this action and for other and further relief as may be proper and equitable.

Affirmation in Opposition Dated December 2, 1994

Respectfully submitted

s/ Sherman Walker
Defendant Pro-Se

Sworn to before me this 28 day of July 1993.

Commissioner of Deeds.

ROBERT L. BAYLISS
Notary Public, State of New York
Qualified in Wyoming County
My Commission Expires April 23, 1994

s/ Robert L. Bayliss

Affirmation in Opposition Dated December 2, 1994

Present. Hon. _____ Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, MOTION TERM

ORDER NO. _____

In the matter of the Application of
Sherman Walker

To proceed as a poor person

On reading and filing the annexed petition of Sherman Walker, Sworn on the __ day of _____, 199__ and the court being satisfied with the truth of the facts alleged and it appearing that the petitioner may have a good cause for a judgment vacating the determination of the Supreme Court of New York State, Queens County pursuant to CPLR Sec. 2221 and Art. 440 of the CPL.

Now, On motion of the petitioner, Sherman Walker, it is ORDERED, that the petitioner be assigned to prosecute this action as a poor person, and it is further ordered that petitioner appellant counsel be assigned should an evidentiary hearing or oral argument be granted, and that a copy of the stenographic transcripts be provided to the petitioner and assigned counsel, and it is further

ORDERED, that the clerk of this court be and be hereby is directed to make no charge for costs or fees to defendant in connection with the prosecution of this action and be further directed to enter the index number and to conform all copies

of petitioner's legal papers in this action, to serve on petitioners behalf all necessary copies the order to show cause, affidavit in support, and all other document filed in this proceeding by petitioner that petitioner should otherwise be required to serve upon the respondent and the district attorney and to return a conformed copy of each document to petitioner, and it is further

ORDERED, that Alden T. Lewis hereby is assigned to said Sherman Walker as the attorney of record whose duty it shall be to conduct said action free of charge to said Sherman Walker [see attached Exhibit A(5)].

ENTERED.

JUSTICE OF THE SUPREME COURT

Dated.

Affirmation in Opposition Dated December 2, 1994

EXHIBIT A(5)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

GUY JAMES MANGANO, P.J.
WILLLAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JR., J.J.

92-01662, 92-02880 and 92-04929

The People, etc.,

respondent,

v.

Sherman Walker,

appellant.

(Ind. Nos. 6542/89, 2119/91 and 2120/91)

DECISION & ORDER ON MOTION
Motion by Counsel to be Relieved of Assignment

Renewed motion by the appellant *pro se* for the assignment of counsel on an appeal from a judgment of the Supreme Court, Queens County, rendered June 6, 1992, indictment number 2120/91.

Affirmation in Opposition Dated December 2, 1996

Motion by assigned counsel to be relieved of an assignment to prosecute appeals from two judgments of the Supreme Court, Queens County, rendered February 27, 1992 and April 9, 1992, respectively. The appellant's motion to dispense with printing and for assignment of counsel was granted on April 6, 1992 on indictment number 6542/89 and May 26, 1992 on indictment number 2119/91, respectively, and the following named attorney was assigned as counsel to prosecute the appeals:

Phillip L. Weinstein, Esq.
The Legal Aid Society
15 Park Row (18th Floor)
New York, New York 10038

Upon the papers filed in support of the motion and the papers filed in opposition or in relation thereto, it is

ORDERED that the motion is granted, and the former assigned counsel is directed to turn over all papers in the action to new counsel herein assigned; and it is further,

ORDERED that pursuant to County Law § 722 the following named attorney is assigned as counsel to prosecute the appeals:

Alden Lewis, Esq.
457 Fulton Street
Brooklyn, New York 11217

and it is further,

Affirmation in Opposition Dated December 2, 1996

ORDERED that the appellant's time to perfect the appeals is enlarged; assigned counsel shall prosecute the appeals expeditiously in accordance with this court's rules (22 NYCRR 670.1, *et seq.*) and written directions.

MANGANO, P.J., THOMPSON, BRACKEN, SULLIVAN and BALLETTA, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

Appellant's Address:

92 A 7140
Downstate Corr. Fac.
P.O. Box 445
Fishkill, New York 12524

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT ON MOTION DATED APRIL 21, 1994

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JR., JJ.

92-01662
92-02880
92-04929

The People, etc.,

respondent,

v

Sherman Walker,

appellant.

(Ind. Nos. 8542/89, 2119/91, 2120/91)

DECISION & ORDER ON MOTION

Decision and Order on Motion Dated April 21, 1994

Motions by the appellant *pro se* for (1) assignment of new counsel on appeals from three judgments of the Supreme Court, Kings County, rendered February 27, 1992, April 9, 1992, and June 6, 1992, and (2) for leave to file a supplemental brief on the appeals, and to be furnished with a copy of the typewritten transcripts of the stenographic minutes.

Upon the papers filed in support of the motion and the papers filed in opposition or relation thereto, it is

ORDERED that the motion for the assignment of new counsel is denied; and it is further,

ORDERED that the motion to file a supplemental *pro se* brief is granted; and it is further,

ORDERED that the District Attorney shall file the typewritten transcripts of the stenographic minutes and the clerk of this court shall deliver those minutes to the person in charge of the institution wherein the appellant is incarcerated for examination by the appellant; the transcripts shall be returned to this court when the appellant files the supplemental brief or informs this court that no supplemental brief will be filed; and it is further,

ORDERED that the appellant shall file nine copies of the supplemental brief and serve one copy on the District Attorney.

Upon delivering the minutes to the institution, the clerk of this court shall advise the appellant of the date by which the minutes are to be returned and the brief filed.

Decision and Order on Motion Dated April 21, 1994

MANGANO, P.J., THOMPSON, BRACKEN, SULLIVAN and BALLETTA, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

April 21, 1994

COVER SHEET OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED MARCH 9, 1994 AND MOTION FOR ASSIGNMENT OF NEW COUNSEL

APPELLATE DIVISION
SUPREME COURT OF THE STATE OF NEW YORK
SECOND JUDICIAL DEPARTMENT
45 MONROE PLACE
BROOKLYN, N. Y. 11201

MARTIN H. BROWNSTEIN
CLERK OF THE COURT

ARNOLD EDMAN
MEL E. HARRIS
DEPUTY CLERKS

March 9, 1994

Sherman Walker
92-A-7141
Box 500
Elmira, N.Y. 14902

RE: CASE # 92-01662 92-02880 92-04929
(3-Separate Cases)
Peo. v WALKER, Sherman
Ind.#6542/89-2119/91-2120/91
Appeal from JC-2/27/92-4/9/92-6/6/92
Supreme, Queens

Cover Sheet and Motion for New Counsel

Dear Sir/Madam:

We have received your application for the following relief:

Motion for assignment of new counsel

The application will be placed on the motion calendar for 3/25/94

Yours truly,

CLERK'S OFFICE

NOTICE TO: Richard Brown w/papers &
Alden Lewis w/papers

Dear Sir/Madam:

The above named appellant has made an application for the following relief:

Motion for assignment of new counsel

This application will be placed on the motion calendar for 3/25/94. On or before that date, please furnish the Motion Clerk with an affidavit expressing your views in this matter.

Very truly yours,

CLERK'S OFFICE

Cover Sheet and Motion for New Counsel

92-01662
92-02880
92-04929

Mr. Sherman Walker
Box 500
ELMIRA, NEW YORK
14902-0500
ID # 92A7141 I-1-26

Dated: February 28, 1994.

To: Hon. Martin Brownstein, Clerk
App. Div. 2nd. Dept. Sup. Ct.
45 Monroe Place
B'klyn, NY 11201

Re: Notice of Motion for reassignment of Counsel/
Ind. No. 6542/89, 2119/91, 2120/91, and
Withdrawal of Counsel main brief.

Dear Sir:

Please acknowledge enclosed are the appropriate legal documents in support of my Notice requesting this Court aid, requesting reassignment of appellant Counsel, and withdrawing appellant main brief.

Please send my legal document to the Justices of the Court for a determination and opinion.

Thank you so much.

Respectfully,

s/ Walker, Sherman
Appellant Pro-Se

Cover Sheet and Motion for New Counsel

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Queens County

Ind #s: 2119/91; 6542/89; 2120/91
AD #s: 92-02880; 92-01662

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

SHERMAN WALKER,

Defendant-Appellant.

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed affidavit of Sherman Walker and all the prior proceedings herein, the undersigned will move this Court, at the Courthouse, 45 Monroe Place, Brooklyn, New York 11201 at 9:30 a.m. on March 5, 1994, or as soon thereafter as counsel can be heard, for an order relieving Alden T. Lewis, Esq., as assigned counsel to appellant because of a conflict of interest, assigning other counsel, and for such other and further relief as this Court deems just.

Cover Sheet and Motion for New Counsel

Dated: New York, New York
Feb. 15, 1994

Yours, etc.,

s/ Sherman Walker
Appellant – *Pro-Se*
Box 500
ELMIRA, New York
14902-0500

TO: MOTION CLERK
Appellate Division
Second Department
45 Monroe Place
Brooklyn, New York 10010

HON. RICHARD A. BROWN
District Attorney
Queens County
125-01 Queens Boulevard
Kew Gardens, New York 11415

SHERMAN WALKER
92 A 7141
ELMIRA Correctional Facility
P.O. Box 500
ELMIRA, New York 12524

Cover Sheet and Motion for New Counsel

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Under Ind. No.: 6542/89, 2119/91 and 2120/91

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

SHERMAN WALKER,

Defendant-Appellant.

RECONSIDERATION AFFIDAVIT IN SUPPORT OF MOTION TO WITHDRAW MAIN BRIEF AND SUBSTITUTE APPELLATE COUNSEL FOR NEW COUNSEL.

STATE OF NEW YORK)
County of Chemung) SS.:

(1). I, *Sherman Walker*, does hereby affirm the following statements to be true under penalties of perjury, except those made upon information and belief, which he believes to be true:

(2). I make this Petition in support of my motion for reassignment of counsel and withdrawal of appellant Counsel's main brief(s) submitted about Jan. 94, 28th day. Pursuant to article 18-B and Section 722-C alone with the

provision established in the (A.B.A.) American Bar Association and that this Honorable Court authorize said services Nunc Pro Tunc so that I am properly afforded an appellant Counsel in my interest to prepare my appellant brief.

(3). I am a lay person in matters of certain areas of this case on the Law and seek to have this Court's indulgence for error or fault pursuant to section 2101(f) of the Civil Practice Law and Rules of the State of New York.

Mr. Lewis, who has his office at 657 Fulton Street, Brooklyn, NY 11217, was assigned by this Court pursuant to 18-B of the County Law, to represent Mr. Walker-Appellant on his appeal from a Judgment of the Supreme Court, Queens County under indictment number *6542/89, 2119/91 and 2120/91*, respectively.

(4). I know that I was convicted of a serious crime(s) because of an unfair trial, and a disinterested Counsel. I must have competent, caring, effective and energetic Counsel "now" in the preparation of my appeal.

(5). This case(s) have only been in process from __ day of May, 1993 and my assigned appellant counsel Mr. Lewis (*see*, attached Ex.(A)), did not meet the best interest of his Client[1]. In fact Appellant Complaint reads as follows:

---

1. App. Counsel preceded by a "App. Couns." refer to Appellant Counsel.

Cover Sheet and Motion for New Counsel

I.

(a). *App. Couns.*, rushed appellant's three briefs without spending quality time for research and appropriate inquiries and at the satisfaction of the Court.

(b). *App. Couns.*, obviously failed to bring to the Court's attention his need for a Co-Counsel assignment to aid him in areas on the construction and research of the pending three appeals in this court.

(c). *App. Couns.*, did not spend quality time on Appellant three appeals. (See Exh(B) attached.)

(d). *App. Couns.*, submitted Appellant briefs to this court without first obtaining the approval of his client's interest in the matter. (*See* Ex(B) attached.)

(e). *App. Couns.*, improperly mislead his client that he would not submit the brief(s) until Appellant had reviewed them for approval first. (See Ex(B) supra attached).

(f). *App. Couns.*, mislead Appellant whereby providing Appellant with phone numbers to contact him which such Phone numbers were insufficient to reach said Counsel. (i.e. the phone number was deactivated, see also Ex.(C) attached.)

(g). *App. Couns.*, failed to responsively respond to Appellant letter(s), dated: 8/9, 16/93, 8/25/93, 9/20/93, 10/12/93 and 11/1/93. (See Ex.(B) attached). Some letters omitted.)

(h). *App. Couns.*, failed to aid appellant to consolidate his C.P.L. 440.10 "pro se" motion to his direct appeal even when his Client sought his aid. Counsel should have known that the Court would deny the Appellant request, in all likelihood.

(i). *App. Couns.*, failed to adequately address to this Court the circumstances revolving around an exculpatory affidavit given to Appellant by the People alleged informant "Mr. T. Heywood", whom personally transcribed in an affidavit that Det. Redmond called by the assistant district attorney under Ind. No. 2119/91 and 2120/91 lied against him and that he was never interviewed by any detective(s) to inform against Mr. Walker appellant. (See Ex(D) attached.)

Appellant rightfully asserts that his appellant Counsel "Mr. Lewis" knowledge of the exculpatory information contained in the affidavit when compared against the information in Appellant main brief Case No. 92-02880 and Case No. 92-04929 proves appellant Counsel deliberately indicated false facts in the brief. The Appellant further assert that this misconduct on Mr. Lewis part constitutes grounds for Mr. Lewis to be substituted and deemed in violation of "Misrepresenting" his client on this level. Mr. Lewis false statements of facts about the allege informant is sharp evidence of this Appellant Counsel intentional misrepresentation, (i.e. compare Ex(D) supra with appellant main brief statement of facts under Ind. No. 2119/91 and 2120/91 about the alleged informant.

(j). *App. Couns.*, failed to move for an extension to adequately prepare the main brief.

(k). *App. Couns.*, failed to raise the issue(s) he had agreed to raise for appellant. (*See*, Ex(B) attached.)

(l). *App. Couns.*, raised issues in the main brief in an insufficient form, style and manner satisfactorily to an appellant brief.

(m). *App. Couns.*, lied to his client by not raising the claim of ineffective assistance of counsel. (*See*, Ex(B) attached.) By not raising this issue, counsel did not conduct himself in the best interests of his client "request and interest."

(n). *App. Couns.*, failed to correctly address the improper statutory and constitutional violations in appellant brief(s).

(o). *App. Couns.*, failed to alert the Court to prosecutorial misconduct committed against his client under the three indictments.

(p). *App. Couns.*, had no real genuine interest in his client's case. Appellant argues that at a professional point of view, his assigned appellant counsel *brief* was not prepared in the best interests of his client's innocence.

(q). *App. Couns.*, is in violation of the attorney client privilege and the Code of his professional responsibilities to his client. *See*, Sachem v. U.S., 34 U.S. 1, 72 S.Ct. 451 (1952).

Cover Sheet and Motion for New Counsel

II. Additional Ground for Withdrawal of the brief and substitution of Counsel

Appellant argues that since he has sought the refuge of this court to tell those in higher authority of his "attorney" misconduct, *Mr. Lewis*, has intentionally violated the confidentiality of the lawyer-client relationship, alternatively, it can also be found that, *Mr. Lewis*, have misrepresented Mr. Walker, and that appellant Counsel was not interested properly constructing appellant main brief.

Appellant further assert that an investigation into the background of the allegations alleged against this Counsel will prove there is an urgent need to remove this Counsel from appellant case in the interests of justice. *In addition, appellant "contend(s)" that he has made a prima facie case of misrepresentation on Appellant counsel part*, therefore, the brief should be withdrawed.

(6). Under these circumstances, it would constitute a conflict of interest for Mr. Lewis to be further allowed to represent appellant on these appeal under the above registered indictment. Even were it later shown that a conflict did not exist in this case, *Mr. Walker* should be assigned new appellant counsel immediately under each indictment, so that helpful counselor(s) whom are interested can handle Mr. Walker's appeal, *because Mr. Walker issues are complex and of a constitutional dimension.*

(7). Comparing the level of representation provided by *Mr. Lewis* Esq., with effective assistance on the A.B.A. Standard, Attorney-Client privilege, it becomes self evident that said representation and/or preparation do not measure up to the constitutionally required level.

. Cover Sheet and Motion for New Counsel

(8). *Mr. Walker* remains incarcerated pursuant to the judgment above. Consequently, Appellant financial circumstances have not changed since he requested the assignment of counsel to perfect his appeal.

No previous application for the same or similar relief herein prayed for his been forthcoming.

Wherefore, *Mr. Lewis* Esq., should be ordered relieved and substituted through assignment of another attorney pursuant to article 18-B section 722-C of the county law; and/or in the alternative, that a hearing be conducted to determine the feasibility of defendant's claim and issue raised against appellant counsel.

Respectfully submitted,

s/ Sherman Walker
Mr. Walker/Appellant
Pro Se
Elmira, New York
B&C 92A7141

Sworn to before me this
15th day of February 1994.

Notary Public

CAROL M. GRIFFITH
Notary Public, State of New York
Qualified in Chemung County No. 4982268
Commission Expires May 28, 1995

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT ON MOTION DATED MAY 7, 1992

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

WILLIAM C. THOMPSON, J.P.
CHARLES B. LAWRENCE
JOHN COPERTINO
FRED T. SANTUCCI, JJ.

92-03188

The People, etc., ex rel. Sherman Walker,

petitioner,

v

Eugene Ienuso, Warden, et al.,

respondents.

2119-91

DECISION & ORDER ON MOTION

Application by the petitioner for a writ of habeas corpus.

Upon the papers filed in support of the application and the papers filed in opposition thereto, it is

Decision and Order on Motion Dated May 7, 1992

ORDERED that the application is denied and the petition is dismissed, without costs or disbursements.

THOMPSON, J.P., LAWRENCE, COPERTINO and SANTUCCI, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

May 7, 1992

PETITION FOR WRIT OF HABEAS CORPUS
DATED APRIL 22, 1992

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM SECOND DEPARTMENT

Ind. No. 2120/91
2119/91
2467/91
2984/91
2960/91
NYSID#50266220

Part AA-2 Queens

Supreme Court, Place Of Incarceration Queens

People of the State of New York
Ex Rel: Sherman Walker

Petitioner.

– against –

Eugene Ienuso, Warden
George Motchan Detention Center
and
Thomas Coughin, Commissioner of the
Department of Correction Services
and
In the Matter of an Application by John J. Santucci,
District Attorney, Queens County

Respondent.

Petition for Writ of Habeas Corpus

Petition For Writ Of Habeas Corpus

To: A Justice of the Supreme Court of the State of New York
Appellate Term Second Department

The Petition of Sherman Walker, respectfully shows that:

1. This Petition is made on behalf of Sherman Walker, who is incarcerated/detained at George Motchan Detention Center, located at 15-15 Hazen Street, East Elmhurst, New York 11370.

2. The cause or pretense of the detention, according to the best knowledge and behalf of the Petitioner is, and Court Order of Committment from the Queens County Supreme Court.

3. That a Court or Judge of the United States does not have exclusive jurisdiction to order the release of said person.

4. This Writ is sought because of an illegal incarceration/ detention, the nature of the illegality being that the petition was:

Denied Due Process under the 14 Amendment by a Court Order that compelled petitioner to participate in a Lineup without his retained counsel presence.

Denied a Felony hearings Pursuant to C.P.L. 180.70.

Denied the right to testify before the Grand Jury pursuant to C.P.L. 190.50.

That the Court lack the proper County jurisdiction over Petitioner Person.

Petition for Writ of Habeas Corpus

SUMMARY ARGUMENT

5. That the relator is unlawfully being detained for the following reasons:

A) On March 27, 1991, the Petitioner was incarcerated at the Brooklyn House of Detention on an unrelated charge.

When on March 23, 1991, Miss Norma Garcia of Queens D.A. office notified detective Redmond from the 109th pct. that a take out order regarding Petitioner Sherman Walker for line ups to be conducted on March 27, 1991 between the hours of 1900 and 2100 hours, at the 109 pct. subject Sherman Walker, NYSID #50266220,

103 pct. 61# 10025 — Case 90/91
114 pct. 61# 17376 — Case 91/91
114 pct. 61# 6318 — Case 92/91
103 pct. 61# 14838 — Case 93/91
103 pct. 61# 15066 — Case 94/91
115 pct. 61# 17169 — Case 142/91

The Petitioner was denied the services of his retained counsel at the line ups that were conducted by law enforcement agencies whom knew the Petitioner already had counsel. The Petitioner further state that his attorney right and access to the line up was blocked by the law enforcement agencies conducting said line ups.

The Petitioner contends that this violated his constitutional Sixth and Fourth amendment rights. In support the Petitioner relies on the merits stated in Matter of Santucci, 458

N.Y.S.2d 1008 (Sup.1983) (supra) Memorandum Cornelius J. O'Brien, Justice., held that once accused at any stage before or after arraignment, to knowledge of law enforcement agencies, already has counsel, his right or access to counsel may not be denied and his attorney may not be excluded from a line up proceedings.

B) That the annexed affirmation of Gary F. Miret, dated March 18, 1991 and affidavit of detective James Redmond, shield #2970 (see exhibit A order to Show Cause), had here by stated the following:

ORDERED, that the 18B County appointed counsel shall be appointed counsel for Petitioner.

ORDERED, that appointed counsel (see exhibit B annexed here to) Submit an order to produce Petitioner, At Part AA-2, at the Court House, 125-01 Queens Blvd. Kew Garden, New York no later than March 20, 1991, if counsel believes petitioner presence to be required at the hearings on this matter. Failure of counsel to submit an order to produce for petitioner by March 20, 1991 will be deemed by this court a waiver by counsel of petitioner presence at the hearings.

C) The Petitioner contends that the facts were insufficient to justify criminal term part AA-2 finding of probable cause and that the respondents had no jurisdiction to compel him to appear in a line up relating to crimes alleging committed inside of this state, to wit, in Queens County pursuant to a court order constituted "Seizure" without adequate basis (See, Santucci v. Andrews, as stated in the Memorandum of

Cornelius J. O'Brien, Justice., held that the People must submit a Supplemental affidavit or affirmation settings fourth specifics as to the connections of the witness(es) to the alleged crime, and the prospective defendant can not, in any event, be viewed by witness(es) to other crimes in connection with which he may be a suspect in absence of a showing of probable cause to arrest him for each separate crime. Furthermore, the Petitioner, argue that the court erred in appointing an 18B attorney for petitioner. Since the petitioner already had the services of a retained attorney during the time the 18B was appoint on March 22, 1991 by the court. The petitioner counsel nor him was given notice about a hearing scheduled to take place on March 20, 1991, or any notice about a subsequent line up (see, C exhibit annexed hereto). The Petitioner contends that his due process rights has been denied in it's entirety. (People v. McLain, 88 Misc. 2d 693, 389 N.Y.S. 2d 976 state that "it has been consistently held by the courts of this state that a suspect incarcerated on an unrelated charge cannot be made to stand in a lineup unless he has been given proper notice in an application spelling out probable cause for granting of the relief sought (see, Matter of Walter Pidgeon, supra, 80 A.D. 2d 568, 435 N.Y.S.2d 763). Moreover, the detention of petitioner in order that he be made to participate in a lineup to be viewed by the witness(es) who have photographically identified him as the individual who committed the alleged crime, constituted seizure without adequate basis (see, Alphonso C. v. Morgethau, 376 N.Y.S.2d 126 A.D. 1st Dept.) The District Attorney made a application for order directing petitioner participation, the petitioner had not been arrested, charged with commission of crime or otherwise named in an accsatort instrument, in light of the people supplemental affirmation

and affidavit it is absence of a showing of probable cause to arrest petitioner for each separate crime. The Respondents application should not have been granted to detain petitioner merely because of a want of power (Matter of Mackell v. Palermo, 59 Misc.2d 760, 765, 300 N.Y.S. 2d 459, 464).

6). That the Petitioner was denied a preliminary-Grand Jury proceeding in the following manner:

After the lineup and prior to a Grand Jury presentation no preliminary hearing was held. The petitioner had a Statutory right to a prompt hearing pursuant to CPL 180.10(2), Where the petitioner is incarcerated, the hearing must be held within one hundred twenty hours CPL 180.80 as amended by 1982 Session Laws ch. 556 § 1; the prosecutor avoided the preliminary hearing by presenting the matter directly to the Grand Jury. (see Court Transcript on this matter) on May 1991 the case was adjourned without notice that said petitioner wished to appear and testify before any pending Grand Jury proceeding. The petitioner attorney was not notified of any preliminary or Grand Jury proceeding. The matter was instead forwith to part K-9, at the court house, 125-01 Queens Blvd. Kew Gardens New York. A petitioner in a Felony case has an absolute constitutional and statutory right to be present at all stages of the criminal procedures and the aid of counsel (N.Y. Const. Art. I § 6).

7. The court lack the proper county jurisdiction over petitioner person as follow:

The petitioner asserts that the order of the criminal term court part AA-2 activated was without county

jurisdiction and is entirely void. The District Attorney Office did not afford petitioner to oppose the court order to participate in the line ups and (2) the failure to establish probable cause in the annexed affirmation of A.D.A. Gary F. Miret, and the affidavit of detective James Redmond, as required by the law. It is the petitioner contention that the court lack county jurisdiction over his person on those basis.

8. An appeal has not been taken from the order by virtue of which said person is incarcerated/detained. The result of said appeal is not applicable.

9. Petitioner is a layman in the Matter of the Law and seek this court's indulgence for error or fault, pursuant to section 2101(1) of the Civil Practice Law and Rules of the State of New York.

10. No previous application for relief sought herein has been made in this court or any other court.

WHEREFORE, your petitioner prays that a Writ Habeas Corpus be issue, directed to the respondent, requiring the respondent to release the said petitioner Sherman Walker, or Whatever other such name maybe know as before a Justice of this Court at 125-01 Kew Garden, Queens Blvd, New York 11415, Special Term, Part ____ thereof on the __ day of _____, 19__.

Petition for Writ of Habeas Corpus

Respectfully submitted

s/ Walker, Sherman
Sherman Walker
Petitioner, Pro Se Motion

SWORN TO BEFORE ME
APRIL 22, 1992

s/ Jeffrey A. St. Clair
JEFFREY A. ST. CLAIR
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-4913073
QUALIFIED IN KINGS COUNTY
COMMISSION EXPIRES NOVEMBER 23, 1992

Petition for Writ of Habeas Corpus

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS — Part AA-2

SP0068-91

NYSID #5026622Q

In the matter of an Application by JOHN J. SANTUCCI, DISTRICT ATTORNEY, Queens County, for an Order directing that a lineup be held and that inmate Sherman Walker be placed in said lineup.

ORDER TO SHOW CAUSE

Upon the annexed affirmation of Gary F. Miret, dated March 18, 1991 and the affidavit of Detective James Redmond, Sh. #2970 complaint reports and upon all the proceedings heretofore had herein.

Let Sherman Walker show cause, at Part AA-2, of this Court, at the Courthouse, 125-01 Queens Boulevard, Kew Gardens, N.Y. on March 22, 1991 at 9 AM of said day or as soon thereafter as counsel may be heard,

Why an Order should not issue commanding and directing Sherman Walker to appear and participate in a lineup to be conducted by the Office of the District Attorney of Queens County at the 109th Precinct on March 25, 1991 or as soon thereafter as is mutually convenient, and it is hereby

ORDERED, that the 18B County appointed counsel shall be appointed Counsel for Sherman Walker in the above entitled action and in all related proceedings and matters, and it is further

ORDERED, that counsel submit an Order to Produce Sherman Walker, to this Court no later than March 20, 1991, if counsel believes his presence to be required at the hearing on this matter. Failure of defense counsel to submit an Order to Produce for this Sherman Walker by March 20, 1991 will be deemed by this Court a waiver by counsel of Sherman Walker's presence at this hearing.

Sufficient cause therefore appearing, let service of a copy of this Order, together with the paper which it was granted, upon 18B County appointed counsel the attorney for the Sherman Walker on or before March 18, 1991 be deemed sufficient service.

Dated: Kew Gardens, N.Y.
March 18, 1991

s/ Vincent F. Naro
Justice of the Supreme Court
HON. VINCENT F. NARO

Petition for Writ of Habeas Corpus

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS — Part AA-2

NYSID 5026622Q

In the matter of an Application by JOHN J. SANTUCCI, DISTRICT ATTORNEY, Queens County, for an Order directing that a lineup be held and that inmate Sherman Walker be placed in said lineup.

AFFIRMATION

Gary F. Miret, under penalty of perjury and pursuant to Section 2106 of the C.P.L.R., affirms and says:

1. That I am an Assistant District Attorney of the County of Queens, of counsel to John J. Santucci, District Attorney of Queens County, and that I am in charge of the investigation of this case.

2. That the appearance of the above-named defendant is required in order to conduct a lineup relating to the charges of Robbery for which he is a suspect, said crimes having been committed in Queens County.

3. That probable cause exists to believe that the above-named committed the alleged crime for the following reasons:

Upon information and belief, and based upon information supplied to my office by Detective James Redmond, Sh. #2970, on January 18, 1991, January 24, 1991, January 25, 1991 and February 14, 1991, photographs of the

subject of this investigation Sherman Walker, NYSID #5026622Q were identified to Detective James Redmond, Sh. #2970 by the persons from whom the subject forcibly took property, in Queens County, on June 26, 1989, March 31, 1990, August 30, 1990, September 7, 1990, September 19, 1990 and October 5, 1990.

Annexed to this application are lettered exhibits. These exhibits are photocopies of official police reports, that establish more fully the circumstances of the incident and the identification.

It is therefore requested that 18B County appointed counsel in Queens be appointed counsel on this case for the subject of this investigation.

4. That the Office of the District Attorney of Queens County is to conduct a lineup at the 109th Precinct on March 25, 1991 between 7:00 – 9:00 p.m.

5. That no prior application has been made for the relief herein prayed for.

WHEREFORE, the People respectfully request that the Court issue an Order commanding and directing the defendant herein to appear and participate in the aforementioned lineup.

Dated: Kew Gardens, N.Y.
March 18, 1991

Respectfully submitted,

JOHN J. SANTUCCI
DISTRICT ATTORNEY
QUEENS COUNTY

by: s/ Gary F. Miret
Gary F. Miret
Assistant District Attorney

Petition for Writ of Habeas Corpus

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM

NYSID #5026622Q

THE PEOPLE OF THE STATE OF NEW YORK

– against –

SHERMAN WALKER,

Defendant.

STATEMENT IN SUPPORT

STATE OF NEW YORK)

COUNTY OF QUEENS) :ss:

Detective James Redmond, Sh. #2970, being duly sworn deposes and says:

A photograph of subject SHERMAN WALKER, NYSID #5026622Q has been identified to myself as the person who forcibly took property from persons known to myself and the District Attorney's Office, on June 26, 1989, March 31, 1990, August 30, 1990, September 7, 1990, September 19, 1990 and October 5, 1990 in Queens County, by the persons from whom the property was taken.

Attached to this statement in support are photo copies of official police reports that more fully establish the circumstances of the incident and identification.

I have read the above statement and swear that it is all true.

All false statements made herein are punishable as a Class "A" Misdemeanor pursuant to Section 210.45 of the New York State Penal Law.

s/ James Redmond
Detective James Redmond,
Sh. #2970

Dated: March 6, 1991

Petition for Writ of Habeas Corpus

COMPLAINT

Robbery

160.15

* * *

Actions of Victim Prior to Robbery, Larceny or Sex Crimes:
Working in Store

* * *

37A Living Together?
No

38 Can Identify?
Stranger

39 Comp. Rec'vd:
Radio

Will View Photo?
Yes

Will Prosecute?
Yes

Reporter ☐ Witness ☒

* * *

Position/Relationship:
Sales person

* * *

Name of Location (Specific):
Jewelry store

40 Address/Location of Occurrence:
28-03 Steinway St.

41 Sec/Post of Occ.:
David

44 Visible by Patrol:
☐ Yes ☒ No

* * *

61 Rep. Ag'cy Code:
N.Y.P.D.

* * *

Case Status:
☒ Open ☐ Closed

Unit Referred To:
114 RIP

* * *

Quantity	Article	Description – Brand, Model, Serial No.
1	Necklace	T/M Channel setting with herring bone chain and 1½ carat white stones (diamonds) valued at $2800.00
1	Bracelet	T/M (Square) woman's bracelet with 78 points of white stones (diamonds) valued at $2000.00

Property Summary

Item	64	66 Value Stolen
Jewelry	05	$4800.00

* * *

Total No. of Perpetrators:
Wanted 1

Weapon:
☒ Used ☐ Possessed

Describe Weapon (if firearm, give color, make, calibre, type, model, etc.):
Canister of mace

Wanted ☒ Arrested ☐

Sex:
M

Race:
Blk

* * *

Age:
28-30

Height:
5 ft. 6-7 in.

Weight:
160

* * *

Hair Color:
Black

Hair Length:
Short

* * *

Accent:
West Indian French

* * *

Clothing Description:
Short black leather jacket, Light blue jeans, black sneakers

* * *

List Additional Victims & Witnesses — (Reconstruct Occurrence including Method of Entry & Escape — include Unique or Unusual Actions:

Complainant present at the 114th Pct., states that at t/p/o, a male Black entered the place of business and pretending to be a customer, asked to see the above described items of jewelry. The male spent approximately 15 to 20 minutes in the store before he produced a small canister of mace and sprayed complainant and witness in face. The perpetrator at this time fled the store with the complainant in pursuit. He ran in the direction of Astoria Blvd., where complainant lost sight of him. [redacted] complained of a burning sensation in [redacted] face at the time of the incident, however, at time of report, [redacted] refused medical aid.

Latest Print Team:
☐ Yes ☒ No

Crime Prevention Survey:
☐ Yes ☒ No

Complaint Report Prepared By:
CALANTJIS, S.

Title:
POLICE OFFICER

Command:
114 RIP

Name Printed:
CALANTJIS, S.

Tax Registry No.:
879401

Command:
114 RIP

* * *

BOROUGH ROBBERY SQD CASE # 92/91

SP 0068-91 **PART AA-2**

SUPREME COURT
QUEENS COUNTY
CRIMINAL TERM

The People, etc.,
vs

Defendant
IMO
SHERMAN WALKER

* * *

ATTY.
s/ Robert Schwartz 18B

Adjournments

PART	DATE	REMARKS	PART
AA2	5-22-91	O.S.C. (LINE-UP)	GRAND

Petition for Writ of Habeas Corpus

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Indictment # *2120/91*

THE PEOPLE OF THE STATE OF NEW YORK,

– against –

SHERMAN WALKER

Defendant,

AFFIRMATION

MICHAEL P. JOSEPH, being duly admitted to practice law in the State of New York, hereby affirms under the penalties of perjury as follows:

1. I represent SHERMAN WALKER in the above encaptioned matter.

2. I previously filed an omnibus motion seeking a variety of relief including the suppression of the identification take took place at a lineup and any in-court identification of the defendant.

3. In my previous affirmation, I set forth relevant facts regarding the lineup that took place in reference to the instant indictment. As stated in said affirmation, the defendant Walker was represented by your affirmant in a case pending in Queens County at the time that he was placed in the lineup. In spite of this fact, your affirmant was not notified or given an opportunity to appear at said lineup.

4. Based upon the Voluntary Disclosure Form provided herein, it appears that the lineup that took place was compelled by court order. This fact, among others caused the defendant's right to counsel to attach. *People v. Jackson* 74 NY 2d 787.

5. The right to counsel is not satisfied by merely appointing a member of the bar. An accused has the right to have his own attorney representing him at any critical stage. I am informed by my client that he stated at said lineup that he was represented by your affirmant and therefore wanted to be represented at the lineup only by your affirmant.

6. In that I represented Sherman Walker on another pending case, and in that he requested that I be present, I should have been allowed the opportunity to appear as Mr. Walker's counsel at said lineup. *People v. Coates* 74 NY 2d 244.

WHEREFORE, your affirmant prays for the relief sought in the motion previously submitted or for any other relief that this court may deem just and proper.

DATED: May 22, 1991
New York, New York

s/ Michael P. Joseph
MICHAEL P. JOSEPH

JAN 8 2001 (5)

Supreme Court, U.S.
FILED
JAN 8 2001
OFFICE OF THE CLERK

No. 00-121

IN THE

Supreme Court of the United States

GEORGE DUNCAN,

Petitioner,

v.

SHERMAN WALKER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

ELIOT SPITZER
Attorney General of the
State of New York
PREETA D. BANSAL*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
DAVID AXINN
ROBERT H. EASTON
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* *Counsel of Record*

Attorneys for Petitioner

164370

Counsel Press LLC
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52 pp

QUESTION PRESENTED

Whether a prior federal habeas corpus petition is an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2), which provides that the one-year statute of limitations for federal habeas corpus petitions set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA") is tolled during the pendency of such an application.

PARTIES TO THE PROCEEDINGS

Sherman Walker ("Walker") was the habeas corpus petitioner and appellant in the courts below, and is the respondent in this Court. Christopher Artuz (the "State") was the habeas respondent and appellee in the courts below. George Duncan (the "State"), petitioner in this Court, is substituted for Mr. Artuz, now retired, as the Superintendent of the Great Meadow Correctional Facility in Comstock, New York, in which respondent Walker is now imprisoned.

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OPINIONS BELOW

The opinion of the Second Circuit is reported at 208 F.3d 357 (2d Cir. 2000) and is set forth in Petition Appendix A. The unreported Memorandum and Order of the district court, dated May 6, 1998, is set forth in Petition Appendix B. The unreported Memorandum and Order of the district court, dated July 9, 1996, is set forth in Petition Appendix C.

STATEMENT OF JURISDICTION

The order of the Court of Appeals was entered on March 27, 2000. The 90-day period for filing a petition for certiorari ended on June 25, 2000. By order dated June 19, 2000, Justice Ginsburg granted an extension of the 90-day period to file a petition to and including July 25, 2000. This petition was filed prior to that date. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 § 101, 110 Stat. 1214, 1217 provides in pertinent part:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d) (Supp. 2000).

STATEMENT OF THE CASE

A. Introduction

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132 § 101, 110 Stat. 1214, 1217 established for the first time a one-year statute of limitations applicable to any application for a federal writ of habeas corpus. In most cases, the period runs from the "conclusion of direct review" of the state court judgment confining the petitioner to state custody. 28 U.S.C. § 2244(d)(1)(A) (Supp. 2000).

The one-year limitations period is tolled, however, during the pendency of "a properly filed application for State post-conviction or other collateral review." *Id.* § 2244(d)(2). With respect to convictions that became final prior to AEDPA's effective date of April 24, 1996, all of the circuits to address the issue, including the Second Circuit, established a one-year grace period, allowing prisoners to file new federal habeas petitions seeking review of pre-AEDPA convictions up to one year after the effective date of the statute. *See Ross v. Artuz*, 150 F.3d 97, 100-02 (2d Cir. 1998) (citing cases). The tolling provision contained in section 2244(d)(2) applies to this one-year grace period as well. *See, e.g., Bennett v. Artuz*, 199 F.3d 116, 119 (2d Cir. 1999) (holding that "AEDPA's pending-state-petition tolling provision does apply to a petition challenging a pre-AEDPA conviction"), *cert. granted and aff'd on other grounds*, 121 S. Ct. 361 (2000) (interpreting "properly filed" language in tolling provision).

The issue in this case arises because Walker filed a federal habeas petition shortly after his State conviction became final. His petition was dismissed without prejudice three months later by the district court (during which time AEDPA became law)

for failure to specify which claims had been exhausted in the state courts in compliance with the requirements of 28 U.S.C. § 2254(b). Rather than filing a renewed federal habeas petition after correcting the pleading defects, or else initiating collateral review proceedings in the State courts to exhaust all claims asserted, Walker waited almost eleven months. He then filed a new federal habeas petition, the subject of this case, but by this time more than one year had passed since AEDPA's effective date. The district court thus dismissed Walker's new petition as time-barred under 28 U.S.C. § 2244(d)(1).

Departing from all of the other United States Courts of Appeals to have considered the issue, the Second Circuit reversed the dismissal. It held that Walker's earlier petition in the federal court qualified as an application for "State post-conviction or other collateral review" within the meaning of the tolling provision applicable to AEDPA's statute of limitations, 28 U.S.C. § 2244(d)(2). Accordingly, the Second Circuit concluded that Walker's earlier petition tolled the one-year grace period for the duration of its pendency (almost three months) in the federal court, rendering Walker's new federal petition timely. The question presented in this case is whether the Second Circuit erred in interpreting the tolling provision of section 2244(d)(2) to encompass federal petitions for habeas review.

B. State Court Convictions

Respondent Sherman Walker was convicted and sentenced for at least three distinct acts of robbery in early 1992. On February 13, 1992, he was convicted of two counts of robbery, in the first degree and in the second degree, after a jury trial in the New York Supreme Court, New York

County. He was sentenced as a second felony offender to concurrent terms of twelve-and-a-half to twenty-five years, and seven-and-a-half to fifteen years, respectively. This conviction was affirmed by the Appellate Division, First Department, on October 3, 1995. *See People v. Walker,* 632 N.Y.S.2d 68 (N.Y. App. Div.) (App. 99a-100a), *leave to appeal denied,* 663 N.E.2d 1268 (N.Y. 1995). (App. 91a)

Thereafter, on February 27, 1992, Walker was convicted and sentenced for a second act of robbery in the second degree following a jury trial in the Supreme Court, Queens County. He received a term of imprisonment of seven to fourteen years. The Appellate Division, Second Department, affirmed this conviction on June 12, 1995. *See People v. Walker,* 628 N.Y.S.2d 951 (N.Y. App. Div. 1995) (App. 101a-103a), *appeal dismissed,* 664 N.E.2d 519 (N.Y. 1996). (App. 95a-96a)

Walker then pleaded guilty in the New York Supreme Court, Queens County, to a charge of robbery in the first degree, arising out of a September 1990 holdup at a jewelry store. Walker was already incarcerated on other prior unrelated charges at the time he was identified by a confidential informant as the leader of a robbery ring and possibly a suspect in this incident, and then positively identified by a jewelry store employee in photographs and a physical lineup. (App. 37a) On June 6, 1992, he was convicted, for the third time, on his guilty plea and sentenced to a term of imprisonment of seven to fourteen years, to run concurrently with the other Queens County sentence. (App. 41a)

The Legal Aid Society was appointed to represent Walker on appeal of each of his three convictions. In the

course of representation, it learned that it had previously represented the person who was a confidential informant and a source of information leading to Walker's identification and arrest, and so withdrew as Walker's appellate counsel on conflict-of-interest grounds. Other appointed appellate counsel was substituted. (App. 82a-83a, 239a-241a)

On appeal of this third conviction, Walker claimed that: (1) the prosecution failed to turn over the prior statement of a testifying witness, which was in its files and which referred to the confidential informant, contrary to *People v. Rosario*, 173 N.E.2d 881 (N.Y.), *cert. denied*, 368 U.S. 866 (1961); (2) his constitutional right to counsel was denied at the lineup because the police failed to contact his counsel retained in a prior, unrelated matter; (3) the lineup was unduly suggestive; and (4) the sentence was excessive. (App. 30a-46a)[1]

Walker's conviction was affirmed on direct appeal to the Appellate Division, Second Department, on June 12, 1995. *See People v. Walker*, 628 N.Y.S.2d 950 (N.Y. App. Div. 1995). (App. 104a-106a) The Appellate Division denied Walker's motion for reargument or leave to appeal to the New York State Court of Appeals (App. 99a-100a), and the New York State Court of Appeals dismissed Walker's application for leave to appeal from these orders on January

1. Walker also filed a pro se supplemental brief on his direct appeal of the second two convictions, claiming that: (1) the prosecution failed to establish the probable cause necessary to justify placing him in a lineup; (2) he was denied his right to counsel at the lineup; and (3) his trial counsel was ineffective. (App. 107a-147a) Walker had moved to withdraw his counsel's brief and to obtain new substituted counsel, based on a detailed specification of counsel's alleged omissions and inadequacies. (App. 245a-256a) The Appellate Division denied the motion, but authorized Walker to file a supplemental brief. (App. 242a-244a)

5, 1996, *see People v. Walker*, 664 N.E.2d 519 (N.Y. 1996). (App. 95a-96a) Walker did not seek direct review from this Court. His third conviction accordingly became final on April 5, 1996, upon the expiration of his 90-day period to petition this Court for a writ of certiorari.

C. Other State Court Proceedings

On April 22, 1992, even before his third conviction (in Queens County), Walker filed a pro se petition for State habeas corpus relief in the New York State Supreme Court, Appellate Division. (Walker was already in State custody for prior unrelated convictions.) Among his included claims, he alleged that he had been denied counsel that he had retained in other matters when he appeared at the lineup leading to his third conviction, and that the court which ordered his appearance in that lineup had lacked personal jurisdiction over him. (App. 259a-282a) The Appellate Division denied the petition on May 7, 1992. (App. 257a-258a)

Following his convictions, Walker initiated repeated challenges in the State courts to the validity of his two Queens County convictions. He twice moved in the trial court (on December 21, 1992 and on May 27, 1993) to vacate both convictions, and the motions were denied by the trial court. (App. 220a-221a, 222a-223a) In August 1993, he moved again in the trial court to reargue the motion to vacate the convictions, in part on grounds of newly discovered evidence in the form of an affidavit from the person identified as the confidential informant. (App. 196a-219a) That motion, to which no response by the State was filed, was denied in an oral decision from the bench. (App. 171a)

Walker thereafter filed in the Appellate Division a proceeding for a writ of mandamus against the trial court judge, seeking an evidentiary hearing or new trial on the basis of the claims in his motion to reargue. (App. 176a-189a) The Appellate Division denied the requested relief on January 17, 1995. (App. 174a-175a) Walker initiated a similar mandamus request in the New York State Court of Appeals (App. 168a-173a), which that court denied in June 1995. (App. 167a)

Finally, on November 24, 1995, Walker filed an application for a writ of error *coram nobis* in the New York State Appellate Division, Second Department, with respect to his two Queens County convictions on grounds of ineffective assistance of counsel. (App. 150a-160a) Walker claimed that: (1) appellate counsel had improperly failed to investigate that the police information from the person identified as the confidential informant was false, and (2) he was deprived of adequate appellate counsel of choice because the Legal Aid Society had thus improperly withdrawn based on its prior representation of the informant. The Appellate Division denied the petition on March 18, 1996, finding no ineffective assistance of appellate counsel. *See People v. Walker,* 639 N.Y.S.2d 932 (N.Y. App. Div. 1996). (App. 148a-149a)

D. Federal Court Proceedings

Three weeks later, on April 10, 1996, Walker filed a single document, constituting a complaint pursuant to 42 U.S.C. § 1983 against the Legal Aid Society and corrections officials, as well as a petition for habeas corpus relief pursuant to 28 U.S.C. § 2254, in the United States District Court for the Eastern District of New York.

(App. 79a-90a) Walker claimed that his detention for each of the three robbery convictions was attributable to a violation of his federal constitutional right to the effective assistance of counsel. In particular, he alleged that the Legal Aid Society improperly moved to be relieved as counsel on the basis of an alleged conflict arising out of its previous representation of a confidential informant, because no confidential informant existed in Walker's case. He also claimed that he had notified the Legal Aid Society of this fact, but that they had failed to investigate his claim. He alleged that Legal Aid's withdrawal as counsel denied him his right to counsel of choice and due process of law.

Two weeks after he filed this first federal habeas petition, AEDPA went into effect on April 24, 1996. Within three months from the date of filing of Walker's petition, the district court (Johnson, J.), on July 9, 1996, *sua sponte* dismissed the petition without prejudice (Pet. App. C) "for failure to adequately set forth his claim." *Walker v. Legal Aid Society*, No. 96 CIV 2946, 1996 U.S. Dist. LEXIS 22492, at *4 (E.D.N.Y. July 12, 1996). (Pet. App. 20a) The court explained that "[b]ecause this Court cannot determine which issues have been properly exhausted in state court, the essential allegations of a habeas corpus action have not been presented." *Id.* (Pet. App. 20a)

Following the dismissal of his habeas corpus petition, Walker took no further action with regard to his convictions for nearly eleven months. On April 24, 1997, the one-year grace period for filing a federal habeas corpus petition applicable to pre-AEDPA convictions expired, without Walker having taken any further steps to preserve his rights.

On May 20, 1997, one month after expiration of the one-year grace period (and nearly eleven months after the federal

district court dismissed his earlier federal habeas corpus petition), Walker filed a new habeas corpus petition in United States District Court for the Eastern District of New York, which petition was referred to the same federal district judge who had adjudicated his first federal petition, Judge Sterling Johnson. (App. 23a-46a) This petition challenged only the third conviction, claiming grounds he had asserted on direct appeal: that the State had (1) failed to produce a detective's affidavit referring to the confidential informant at the appropriate juncture, and (2) that the State violated Walker's constitutional right to counsel by failing to adequately notify his retained counsel (in another matter) of his participation in the lineup. (App. 26a-27a)

The State moved to dismiss Walker's habeas corpus petition on the ground that the petition was untimely under 28 U.S.C. § 2244(d) (App. 47a-67a), and Walker filed a reply. (App. 68a-79a) In a Memorandum and Order dated May 6, 1998 (Pet. App. B), the district court (Johnson, J.) dismissed the petition as time-barred under section 2244(d). The court applied the then-applicable rule of the Second Circuit, *see Peterson v. Demskie,* 107 F.3d 92, 93 (2d Cir. 1997), that post-AEDPA petitions challenging pre-AEDPA convictions could be filed within a "reasonable time" after AEDPA's effective date of April 24, 1996, which may or may not extend to a full year after AEDPA's effective date.[2] The district court held that the petition was not filed within a reasonable time because it was not filed until

> over one year and four months after the completion of his direct appeal, over one year after the effective

2. Shortly after the district court's decision, the Second Circuit in *Ross v. Artuz,* 150 F.3d 97, 100-02 (2d Cir. 1998), adopted the one-year grace period for the filing of habeas corpus petitions challenging convictions which became final prior to the effective date of AEDPA. The grace period ran from April 24, 1996, the effective date of AEDPA, to April 24, 1997.

> date of AEDPA, and almost one full year after his first habeas petition was dismissed. Even after being notified that his first habeas petition failed to state a claim, Walker waited almost one year to file his second habeas petition.

(Pet. App. 15a) The district court denied a certificate of appealability. (Pet. App. 16a) Walker moved for reconsideration of the judgment in the district court, which that court denied. (App. 16a-18a)

By order dated December 18, 1998, the Second Circuit granted Walker a certificate of appealability (App. 21a-22a), and subsequently appointed counsel to represent Walker in the appeal.

E. Decision Below

The Second Circuit reversed the district court, reinstating and remanding Walker's petition for further proceedings. *See Walker v. Artuz*, 208 F.3d 357 (2d Cir. 2000). (Pet. App. A) The court concluded that Walker's federal habeas corpus petition was an "application for State post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2), which therefore tolled the approximately 80 days during which Walker's first petition for habeas corpus had been pending after the enactment of AEDPA. *Walker*, 208 F.3d at 361-62. (Pet. App. 10a)

The court reasoned that " 'State' modifies only the word 'post-conviction,' and the phrase 'other collateral' is to be given its naturally broader meaning." *Id.* at 359. (Pet. App. 5a) Finding that "[t]he disjunctive 'or' in the statute creates a distinct break between the two kinds of review," *id.*, the court chose "to adopt an interpretation that gives full meaning to the phrase 'State

post-conviction review,' which includes all state remedies, and the phrase 'other collateral review,' which means federal habeas petitions." *Id.* at 360. (Pet. App. 6a)

Moreover, the court noted that "the phrase 'other collateral review' would be meaningless if it did not refer to federal habeas petitions." *Id.* (citation and internal quotation marks omitted). The court based this analysis on its belief "that there were [no] 'other' forms of 'collateral review' that did not come within the scope of 'post-conviction review.' " *Id.* (Pet. App. 7a)

The Second Circuit recognized the overall policy objectives of AEDPA of "streamlining the habeas review process and lending finality to state convictions." *Id.* at 361. (Pet. App. 8a) In the court's view, however, tolling the limitations period during the pendency of a federal petition would not create a loophole that would allow easy evasion of the limitations period through the filing of repeat federal petitions. Because the tolling provision pertains only to "properly filed" applications, 28 U.S.C. § 2244(d)(2), the court reasoned that such successive federal petitions "arguably" would not satisfy the "properly filed" proviso so as to qualify for the toll. *Walker*, 208 F.3d at 360. (Pet. App. 7a)[3] Moreover, the court noted that repeat federal petitions

3. Notably, the Second Circuit's understanding of the phrase "properly filed," 28 U.S.C. § 2244(d)(2), was subsequently rejected by this Court in *Artuz v. Bennett*, 121 S. Ct. 361 (2000). A petition is "properly filed" when "it is delivered to, and accepted by, the appropriate court officer for placement into the official record" and "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Id.* at 363-64. "[T]he question whether an application has been 'properly filed' is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural error." *Id.* at 364.

would be barred by AEDPA's restrictions on successive petitions if an earlier federal petition had been dismissed on the merits or with prejudice. *Id.*

Instead, according to the court, including federal habeas corpus petitions within the scope of section 2244(d)(2) would reward petitioners for filing as soon as possible: "[D]efendants will have an incentive to file their federal petitions right away because this filing will toll the one-year statute of limitations." *Walker*, 208 F.3d at 361. (Pet. App. 8a) The court stated that its interpretation would, therefore, promote the statutory objective of efficiency in the review process. *See id.* at 360-61. (Pet. App. 8a)

By order dated November 13, 2000, this Court granted the State's petition for certiorari limited to question 1. (Pet. i; App. 20a)

SUMMARY OF ARGUMENT

Under the guise of giving full meaning to the phrase "State post-conviction or other collateral review" within the tolling provision, the Second Circuit erroneously equated "other collateral review" with federal habeas review. The Second Circuit's reading of section 2244(d)(2) is contrary to the plain text of the provision, applicable canons of statutory interpretation, and the principles of comity and federalism underlying this Court's habeas jurisprudence and AEDPA.

First, the Second Circuit's interpretation would require rewriting the statutory text. Contrary to basic rules of grammar, the Second Circuit disjoined the unitary phrase

"State post-conviction or other collateral review" into distinct parts, thus effectively inserting the only noun, "review", at a second, additional point in the phrase. In so doing, the Second Circuit also rendered the word "State" superfluous. Had Congress intended to toll the statute of limitations for the filing of federal habeas petitions, it simply could have omitted "State" altogether.

The Second Circuit based its interpretation on the erroneous assumption that no state "other collateral review" exists other than state "post-conviction" review. In fact, state courts make available a range of state collateral proceedings that are not "post-conviction" challenges, including challenges to confinement in a state mental facility or to pretrial detention. It is to state proceedings like these that the phrase "other collateral review" refers.

Second, the Second Circuit's interpretation is inconsistent with longstanding principles of statutory construction. Section 2263(b)(2), the parallel tolling provision for habeas petitions in capital cases, expressly limits its terms to state proceedings. It defies logic that Congress would grant greater tolling, and thus more expansive opportunities for federal habeas review, in non-capital cases than in capital cases. The Second Circuit further ignored the fact that when Congress sought to bring both federal as well as state proceedings within AEDPA's scope, it did so expressly. *See, e.g.*, 28 U.S.C. §§ 2263(b)(2), 2254(i), 2261(e), and 2264(a)(3). Indeed, the loose statutory interpretation that led the Second Circuit to construe the word "other" as referring to "federal" is particularly inappropriate, given that references to sovereign entities should be strictly construed and implied references to sovereign entities should be avoided.

Finally, the Second Circuit's construction of section 2244(d)(2) undermines the goal of AEDPA's statute of limitations and the total exhaustion requirement established in *Rose v. Lundy*, 455 U.S. 515 (1982). A petitioner could circumvent the statute of limitations by deliberately or inadvertently filing an unexhausted federal habeas petition because, under the Second Circuit's interpretation, the one-year limitations clock of section 2244(d)(1) would freeze as soon as the petition were filed. This result would prolong indefinitely the review process and unnecessarily burden federal courts with piecemeal litigation – an outcome wholly inconsistent with this Court's habeas jurisprudence and AEDPA's objectives of lending finality to state court judgments, fostering exhaustion of state court procedures, and enhancing the efficiency of federal habeas review.

The judgment of the Second Circuit should be reversed.

ARGUMENT

A FEDERAL HABEAS PETITION IS NOT AN "APPLICATION FOR STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW" WITHIN THE MEANING OF THE TOLLING PROVISION APPLICABLE TO AEDPA'S STATUTE OF LIMITATIONS

In breaking with every other circuit court to address the issue, the Second Circuit erred in construing section 2244(d)(2) as tolling AEDPA's limitations period during the pendency of any prior federal habeas petition. The Second Circuit's reading of section 2244(d)(2) is contrary to the plain text of the provision, the applicable canons of statutory construction, the principles of comity and federalism underlying the exhaustion requirement for federal habeas

petitions and the policy of AEDPA. Accordingly, the judgment of the Second Circuit must be reversed.

I. The Plain Language Of The Tolling Provision Does Not Encompass Prior Pending Federal Habeas Petitions

In construing the meaning of the tolling provision for AEDPA's statute of limitations, this Court's analysis begins, "as always, with the language of the statute." *Williams v. Taylor*, 120 S. Ct. 1479, 1487 (2000) (interpreting another provision of AEDPA, 28 U.S.C. § 2244(e)(2)). Indeed, "a natural reading of the full text" is the "first criterion in the interpretive hierarchy" for a statute. *United States v. Wells*, 519 U.S. 482, 490 (1997).

Section 2244(d)(2), which tolls the one-year statute of limitations established by AEDPA, reads as follows:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2).

The United States Courts of Appeals for the Third, Fifth, and Ninth Circuits have concluded that this provision does not toll AEDPA's one-year period of limitations during the pendency of a federal habeas petition. *See Jiminez v. Rice*, 222 F.3d 1210, 1213 (9th Cir. 2000); *Grooms v. Johnson*, 208 F.3d 488, 489 (5th Cir. 1999); *Jones v. Morton*, 195

F.3d 153, 158-59 (3d Cir. 1999). These courts of appeal have determined that the word "State" in the phrase "State post-conviction or other collateral review" modifies both "post-conviction" and "other collateral" in defining the kinds of review that toll the running of the limitations period. *See Jiminez*, 222 F.3d at 1213; *Grooms*, 208 F.3d at 489; *Jones*, 195 F.3d at 159.[4]

Similarly, the Fifth, Sixth, Tenth and Eleventh Circuits have held that petitions for certiorari to this Court do not constitute "other collateral review" within the meaning of § 2244(d)(2) because such petitions are not applications for "State" review. *See Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000); *Isham v. Randle*, 226 F.3d 691, 695 (6th Cir. 2000); *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 1834 (2000); *Rhine v. Boone*, 182 F.3d 1153, 1155-56 (10th Cir. 1999), *cert. denied*, 528 U.S. 1084 (2000).

In this case, the Second Circuit acknowledged that "[i]t is possible to interpret the word 'State' in section 2244(d)(2) to modify both 'post-conviction' and 'other collateral.' " *Walker*, 208 F.3d at 359. (Pet. App. 5a) But the Second Circuit nonetheless split with all other circuit courts that have considered the issue. It found that " 'State' modifies only

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4. Legal scholars have failed to countenance a viable contrary interpretation, and instead simply have stated unequivocally that section 2244(d)(2) does not toll AEDPA's statute of limitations during the pendency of a federal habeas petition. *See* Larry W. Yackle, *Post-Conviction Remedies* 346 (1st ed. Supp. 2000); Richard H. Fallon, et al., *Hart and Wechsler's The Federal Courts and the Federal System* 162 (4th ed. Supp. 1999); 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* 229-30 (3d ed. 1998).

the word 'post-conviction,' and the phrase 'other collateral' is to be given its naturally broader meaning" to include federal habeas petitions. *Id.* According to the Second Circuit,

> [t]he disjunctive "or" in the statute creates a distinct break between the two kinds of review. . . . [A]pplying "State" to both of the disjunctive phrases would create a linguistic oddity because the statute would refer to "a properly filed application" for "State post conviction . . . review" or "State . . . other review." "State other **collateral** review" is an ungainly construction that we do not believe Congress intended.

Id. at 359-60 (emphasis in original). (Pet. App. 5a-6a)

The Second Circuit's interpretation of "State" as modifying only "post-conviction," rather than the entire phrase following that word, impermissibly rewrites the plain language of the provision in two important ways.

First, the Second Circuit's interpretation effectively inserts the word "review" at a second point in the phrase "applications for State post-conviction or other collateral review" — at the point following "State post-conviction" and before "or other collateral review." As the Second Circuit acknowledges, its interpretation disjoins the phrase into two distinct forms of review, "State post-conviction" review and "other collateral review." *See id.* at 360. (Pet. App. 6a) Had Congress so intended to create a complete disjunction between the two halves of the phrase, it could have achieved a grammatical break in precisely this manner, by inserting the word "review" after "post-conviction" in the first half of

'the phrase. Congress, however, did not do so. Instead, the word "review" appears only once, at the end of the phrase.

The more natural reading of the statute, which eschews the Second Circuit's effective rewrite of the provision, is that Congress intended the entire subject of the prepositional phrase modifying "application" — "State post-conviction or other collateral review" — to be read as a single unit. Read in this manner, the word "State" modifies the only noun ("review"), which is the object of the preposition "for", at the point at which the noun appears in the phrase. *Cf. International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 79-80 (1991) (interpreting statute by finding that there is only one grammatical subject modified by a compound prepositional phrase). Indeed, the absence of any comma or other punctuation dividing the phrase "State post-conviction or other collateral review" provides further "useful confirmation" that Congress intended such a reading. *United States v. Naftalin*, 441 U.S. 768, 774 n.5 (1979); *cf. United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (finding support for a "natural reading" of a statutory phrase as independent of subsequent statutory language in the fact that the phrase "is set aside by commas").[5]

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5. Moreover, the statutory canon of *ejusdem generis* provides that "a general statutory term should be understood in light of the specific terms that surround it." *Hughey v. United States*, 495 U.S. 411, 419 (1990). Applying this principle, "other collateral review" must be read in light of the words that immediately precede it, including "State." Thus "other collateral review" means "other State collateral review, and does not denote an entirely new, non-state class of review." *Sperling v. White*, 30 F. Supp. 2d 1246, 1253 (C.D. Cal. 1998).

Second, the Second Circuit's interpretation renders meaningless a critical word in that phrase — "State". Had Congress intended both state and federal petitions for collateral review to be encompassed within the tolling provision, it could simply have omitted "State" from the phrase "State post-conviction or other collateral review" and provided that the "time during which a properly filed application *for post-conviction or other collateral review* . . . is pending shall not be counted toward any period of limitation." It is "a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 120 S. Ct. 1495, 1519 (2000) (internal quotation marks omitted). By concluding that the tolling provision sweeps all habeas petitions within its scope, the Second Circuit violated this basic principle.

The Second Circuit recognized the importance of this principle, erroneously justifying its conclusion on the ground that "the phrase 'other collateral review' would be meaningless if it did not refer to federal habeas petitions." *Walker*, 208 F.3d at 360. (Pet. App. 6a) But this reasoning rested on a critical, but incorrect, assumption: that there is no "other collateral review" in State courts apart from State "post-conviction" review.

Habeas corpus is "a remedy available to effect discharge from *any* confinement contrary to the Constitution or fundamental law" — civil or criminal. *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973) (emphasis added). *See generally* 1B Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation* § 10.7 (3d ed. 1997) (collecting cases demonstrating that habeas corpus is available to mental patients, juvenile delinquents and those detained upon a

finding of civil contempt). When an order of confinement is not premised on a criminal conviction, remedies challenging that confinement are not, by definition, "post-conviction," but nevertheless may be "collateral." *See Parke v. Raley*, 506 U.S. 20, 30 (1992) (defining collateral attack as a proceeding with an independent purpose other than to overturn a prior judgment that, if successful, would deprive the prior judgment of its normal force and effect).

Indeed, there is a wide variety of State "collateral review" that is not "State post-conviction" review. A ready example that is widely recognized in the law involves challenges to confinement in a mental institution. Individuals seeking release from a mental institution may apply for federal habeas relief. *See* Schwartz & Kirklin, *supra*, at 599; *see also Souder v. McGuire*, 516 F.2d 820, 823 (3d Cir. 1975) ("There is no question about the appropriateness of habeas corpus as a method of challenging involuntary commitment to a mental institution.").

In order to obtain federal habeas review of a confinement, however, a person must first exhaust available state court procedures. *See* 28 U.S.C. §§ 2254(b), (c); *Buthy v. Commissioner of the Office of Mental Health*, 818 F.2d 1046, 1051 (2d Cir. 1987) (noting that plaintiff could challenge pre-hearing confinement in "forensic unit" of mental facility "only by petitioning for a writ of habeas corpus and after exhausting state remedies as required by 28 U.S.C. § 2254(b), (c)").[6]

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6. *See also Kolocotronis v. Holcomb*, 925 F.2d 278 (8th Cir. 1991) (holding that habeas petitioner confined in state hospital, pursuant to verdict of not guilty by reason of insanity, sufficiently alleged exhaustion of state remedies).

In New York, the available State court procedures that must be exhausted prior to a federal habeas proceeding seeking review of a mental health confinement include State habeas corpus proceedings. *See, e.g., Mental Hygiene Legal Services ex rel. Cruz v. Wack*, 551 N.E.2d 95 (N.Y. 1989) (reviewing State habeas corpus proceeding in which petitioner sought release from psychiatric facility). Because confinement in a mental health facility most often results *without* a criminal conviction, *see, e.g., id.*, 551 N.E.2d at 95 n.1 (State habeas petitioner committed to state psychiatric facility after held not guilty by reason of mental disease or defect), such State habeas proceedings are in fact proceedings for State "collateral," rather than "post-conviction," review.

Similarly, challenges to pre-trial detention are proper subjects for federal habeas review if state remedies have been exhausted. *See Braden v. 30th Judicial Circuit Court,* 410 U.S. 484, 488-90 (1973) (pre-trial federal habeas relief based on denial of speedy trial is available to petitioner in custody who exhausts available state court remedies). Again, a state collateral proceeding is the means by which the legality of pre-trial detention must be challenged before a federal habeas petition may be brought. *See, e.g., People ex rel. Klein v. Krueger,* 255 N.E.2d 552, 553-54 (N.Y. 1969) (state habeas petitioner may challenge denial of bail or amount at which bail is fixed); *People ex rel. Chakwin v. Warden*, 470 N.E.2d 146, 148 (N.Y. 1984) (state habeas petitioner may challenge allegedly unlawful pre-trial detention in violation of state "speedy trial" statute); *see generally* Jack B. Weinstein, et al., *New York Civil Practice* § 7002.03 (2000) (citing cases that New York state habeas corpus is proper remedy for unlawful detention based on amount of bail or trial delay). Because an incarcerated person awaiting trial has not yet

been convicted, he or she must, in order to bring a federal habeas petition, exhaust a state court remedy for collateral relief that is in no way a "State post-conviction" remedy.

Far from being meaningless, therefore, Congress's inclusion of the phrase "other collateral review" in section 2244(d)(2) simply obviated the need to catalog exhaustively the numerous and varied state court collateral review remedies that do not fall within the ambit of state "post-conviction" review. Because "post-conviction" review is a subset of "other collateral review," reading the words "other collateral review" in section 2244(d)(2) to include only state petitions for collateral review does not, as the Second Circuit asserted, deprive the phrase of meaning.[7]

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7. Indeed, the broad ramification of the Second Circuit's interpretation of the tolling provision — to exclude other state collateral review from the scope of AEDPA (as well as from the scope of the tolling provision) — is without support. AEDPA did not so drastically alter the scope of the federal habeas corpus remedy as to exclude review of civil judgments or pre-conviction orders leading to confinement, thereby limiting the remedy to review of confinements based exclusively upon criminal convictions. *See, e.g., Francis S. v. Stone*, 221 F.3d 100 (2d Cir. 2000) (applying AEDPA to federal habeas petition filed by a petitioner committed to a mental institution pursuant to a plea of not responsible by reason of mental disease or defect).

In fact, section 2244(d)(2) contemplates that a petitioner may pursue "State post-conviction or other collateral review with respect to the pertinent *judgment or claim*" (emphasis added). If Congress had not intended for the federal habeas remedy to remain available for challenges to the legality of confinement *not* premised on a criminal conviction, it would have been unnecessary for Congress to have included the words "or claim" in section 2244(d)(2).

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To the contrary, by interpreting the provision as it did, the Second Circuit rendered meaningless and effectively eliminated the word "State" from the phrase at issue, or else inserted the word "review" after the phrase "State post-conviction." Courts "are not free, under the guise of construction, to amend the statute" where Congress has chosen its words carefully. *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 199 (1952). Rather, "when the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 120 S. Ct. 1942, 1947 (2000) (internal quotation marks omitted).

This remains true in the habeas corpus context. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("[W]e have long recognized that 'the power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law,' and we have likewise recognized that judgments about the proper scope of the writ are 'normally for Congress to make.' ") (citations omitted); *see also Artuz v. Bennett*, 121 S. Ct. at 365 (2000) ("[I]t is not the province of this Court to rewrite the [AEDPA] statute . . . .").

Had Congress intended for section 2244(d)(2) to include the word "review" twice — or, for that matter, to include

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See Williams, 120 S. Ct. at 1520; *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (refusing to regard particular words of statute as "mere surplusage"). Moreover, AEDPA left unchanged 28 U.S.C. § 2254(a), which provides that habeas relief is available to a person in custody "pursuant to the judgment of a State court." The provision does not distinguish between civil and criminal confinements.

any express mention of federal habeas petitions at all — "it could simply have said so." *Hartford Underwriters*, 120 S. Ct. at 1947; *see also Williams v. Taylor*, 120 S. Ct. at 1488 ("Had Congress intended a no fault standard [in 28 U.S.C. § 2254(e)(2) as amended by AEDPA], it would have had no difficulty in making its intent plain. It would have had to do no more than use, in lieu of the phrase 'has failed to,' the phrase 'did not.' "). This Court should refuse to alter the plain language of the statute.

II. Traditional Principles of Statutory Construction Confirm That Section 2244(d)(2) Does Not Encompass Pending Federal Habeas Petitions

That the plain language of Section 2244(d)(2) does not encompass federal habeas applications is confirmed by traditional principles of statutory construction: first, that similar provisions in the statute should be examined to shed light upon the meaning of the provision at issue; second, that the breadth of the language at issue should be compared to other more specific references in the statute to determine whether it would be consistent with the statute as a whole to infer specific meaning from a broad phrase; and third, that statutory references to sovereign entities should be specified by Congress and should not be lightly inferred from broad textual language, especially in the context of habeas corpus, where delineation of the respective roles of the federal and state sovereigns is paramount.

A. Comparison Of The Tolling Provision At Issue To The Tolling Provision Applicable To The Statute of Limitations In Capital Cases Confirms Petitioner's Interpretation

The tolling provision at issue here most closely resembles section 2263(b)(2), the tolling provision applicable to federal habeas petitions in capital cases. *See* 28 U.S.C. § 2263(b)(2). Section 2263(b)(2) tolls the limitations period in capital cases "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition." *Id.* By using "post-conviction review or other collateral relief" to refer solely to relief sought in "State court," Congress left no doubt that, for habeas petitions in capital cases, the previous filing of an unexhausted federal habeas petition does not toll the statute of limitations.

There is no basis in law or policy to believe that Congress intended to toll the statute of limitations for both pending federal and state habeas proceedings in non-capital cases, but only for state habeas proceedings in capital cases. To the contrary, statutory construction

> is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Inc., 484 U.S. 365, 371 (1988) (citations omitted); *see also United States Nat'l Bank of Oregon v. Independent*

Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993) (" '[I]n expounding a statute, [courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' ") (quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1849)); *Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 343 (1994) (reading of statute that is "plausible when viewed in isolation" is "untenable in light of" statute "as a whole").

Such is the case here. By stating clearly that the tolling of the limitations period in capital cases is to apply only to pending state court proceedings, Congress left no doubt as to the proper interpretation of the tolling provision applicable in non-capital cases as well. It defies logic to believe that Congress intended to allow for unexhausted federal habeas petitions to toll the limitations period in all cases *except* capital cases, where the consequences of constitutional error are of the highest potential order of gravity.

B. Where Congress Intended In AEDPA To Reference Both State And Federal Collateral Proceedings, It Did So Expressly And Explicitly

An examination of other provisions of the federal habeas statute, as amended by AEDPA, confirms that section 2244(d)(2)'s use of the words "State post-conviction or other collateral review" does not contemplate that the filing of federal habeas petitions will toll the one-year period of limitations. *See Gutierrez v. Ada*, 120 S. Ct. 740, 744 (2000) ("[W]ords and people are known by their companions."). Where Congress meant in AEDPA and the habeas statute to refer to both state and federal proceedings, it did so explicitly.

For example, AEDPA provided that "[t]he ineffectiveness or incompetence of counsel during *Federal or State collateral post-conviction proceedings* shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i) (emphasis added). The parallel provision for habeas procedure in capital cases states not only that "[t]he ineffectiveness or incompetence of counsel during *State or Federal post-conviction proceedings* in a capital case shall not be a ground for relief," but also that "[t]his limitation shall not preclude the appointment of different counsel . . . at any phase of *State or Federal post-conviction proceedings*." *Id.* § 2261(e) (emphases added). Likewise, AEDPA provided that, in habeas petitions in capital cases, a district court may consider a claim not raised and decided on the merits in the state courts if, *inter alia*, the failure to raise the claim properly is "based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim *for State or Federal post-conviction review*." *Id.* § 2264(a)(3) (emphasis added).

Provisions such as sections 2254(i), 2261(e), and 2264(a)(3) underscore that when Congress intended in AEDPA to refer to both state and federal post-conviction or collateral review, "it knew how to do so." *Custis v. United States*, 511 U.S. 485, 492 (1994); *see also Martin v. Hadix*, 527 U.S. 343, 354 (1999) (rejecting construction of statute where Congress "could have used language more obviously targeted" to alleged statutory purpose). "It simply isn't plausible" that Congress, which was so clear in the other sections of AEDPA, "would be so delphic" in section 2244(d)(2). *Lindh v. Murphy,* 521 U.S. 320, 331-32 (1997); *see also Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership,* 526 U.S. 434, 450 (1999) ("It is unlikely that the drafters of legislation so long and minutely complicated . . . would have used two distinctly different

forms of words for the same purpose."); *Russello v. United States,* 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted); *id.* (refraining from concluding that "differing language" in two subsections of statute "has the same meaning in each" and refusing to ascribe "this difference to a simple mistake in draftsmanship").

C. In Construing References To Sovereign Entities, Especially In Statutes Where Federalism Issues Lie At The Core, Broad Construction Has No Place

Finally, had Congress intended section 2244(d)(2) to toll the one-year limitations period for proceedings in federal courts as well as those in state court, " 'the ordinary dignities of speech would have led' to its mention [of federal proceedings] by name." *United States v. Cooper Corp.*, 312 U.S. 600, 606 (1941) (citation omitted) (holding that provision of Sherman Act authorizing "any person" to bring action for trebles damages does not authorize action by the United States government).[8]

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8. *Cooper* quoted *Davis v. Pringle*, 268 U.S. 315 (1925), in which Justice Holmes, in interpreting a provision of the Bankruptcy Act, stated for this Court:

> The States are mentioned [in subsection] (5) before the United States, showing that their laws were primarily in mind. The United States seems added to avoid some possibly overlooked case. The ordinary dignities of

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This is so because the words "State" and "Federal" are not ordinary words; rather, they refer to entities having special significance in the constitutional scheme. The interrelationship of state and federal entities "occupies a highly important place in our Nation's history and its future." *Younger v. Harris,* 401 U.S. 37, 45 (1971).

Indeed, our constitutional scheme rests upon the fundamental constitutional independence of the state and lower federal courts. *See Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs,* 398 U.S. 281, 285-286 (1970). Especially in the context of federal habeas relief — where Congress is concerned particularly about delineating the respective roles of federal and state courts — it strains credulity and violates sound principles of statutory construction to think that Congress intended, without saying so expressly, that section 2244(d)(2)'s use of "other collateral relief" would refer to federal habeas petitions.

Unquestionably, habeas corpus implicates "[t]he complexities of our federalism." *Brown v. Allen,* 344 U.S. 443, 498 (1953) (Frankfurter, J.); *see also Williams v. Taylor,* 120 S. Ct. at 1490 ("Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts."); *Duckworth v. Eagan,* 492 U.S. 195, 210 (1989) (noting that habeas " 'intrudes on state sovereignty

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> speech would have led to the mention of the United States at the beginning of the clause, if within its purview. Elsewhere in cases of possible doubt when the Act means the United States it says the United States.

Davis, 268 U.S. at 318.

to a degree matched by few exercises of federal judicial authority' ") (O'Connor, J., concurring) (quoting *Harris v. Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting)). The interrelationship of federal and state court proceedings lies at the very historic core of habeas doctrine:

> This seemingly technical problem of jurisdiction concerns the relation of the United States and the courts of the United States to the States and the courts of the States. Under any circumstances, this is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years.

Darr v. Burford, 339 U.S. 200, 220 (1950) (Frankfurter, J., dissenting) (internal quotation marks omitted).

Accordingly, in a statute where the respective roles of the federal and state courts are defined with specificity, "loose statutory construction" has no place. *Atlantic Coast Line R.R.*, 398 U.S. at 287.

> Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.

Palmer v. Massachusetts, 308 U.S. 79, 83-84 (1939).

In light of these basic principles, section 2244(d)(2)'s use of the words "other collateral relief" should not be interpreted to refer to proceedings by a different and unspecified sovereign — here, the federal government — when the provision at issue mentions only "State" proceedings.

III. Tolling The Statute Of Limitations For Pending Federal Habeas Petitions Would Be Contrary To The Values And Purposes Underlying AEDPA

As the Second Circuit acknowledged, AEDPA's establishment of a statute of limitations applicable to federal habeas petitions "was a dramatic change in the law and was Congress' primary vehicle for streamlining the habeas review process and lending finality to state convictions." *Walker*, 208 F.3d at 361. (Pet. App. 8a) In the ten years prior to AEDPA's enactment, more than 80 bills proposing a statute of limitations for habeas corpus petitions had been introduced in Congress. *See Lonchar v. Thomas*, 517 U.S. 314, 333 (1996) (Appendix listing the bills). When Congress finally reformed the habeas corpus laws in 1996, the new one-year limitations period for filing habeas petitions was a key element of the reform effort to address "acute problems of unnecessary delay" in habeas review, *see* H.R. Conf. Rep. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 944, so as to promote finality to and respect for state court judgments.

The Second Circuit justified its reading of the tolling provision on the basis that the congressional goal in enacting the limitations period was "to spur defendants to file their federal habeas petitions more quickly," that is, to give defendants "an incentive to file their federal petitions right away because this filing will toll the one-year statute of limitations." *Walker*, 208 F.3d at 361. (Pet. App. 8a) This view of congressional goals fails to come to terms with the fundamental values and purposes underlying AEDPA and its statute of limitations.

The statute of limitations enacted in AEDPA was written to balance twin goals of comity in tension, *i.e.*, to balance

the goal of reducing delays to the finality of state convictions, with the goal of ensuring full exhaustion of state court remedies. *See* H.R. Rep. No. 104-23, at 9 (1995) (explaining the statute of limitations provisions are designed to "curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner") (Judiciary Committee report accompanying H.R. 729, an immediate precursor of AEDPA in the same Congress, which contained the identical statute of limitations enacted under AEDPA).

AEDPA did so by enacting a statute of limitations which allows for exhaustion of state remedies in two ways: by commencing the limitations period, at the earliest, after the direct appellate review process is over, *see* 28 U.S.C. § 2244(d)(1)(A), and by enacting a tolling provision for properly filed applications for State post-conviction or other collateral review of the judgment or claim, *see id.* § 2244(d)(2). Tolling the statute of limitations for state court collateral proceedings furthers comity, because it allows and encourages full exhaustion of state court remedies, thereby affording state courts the first opportunity to consider prisoners' federal claims as the case advances toward finality.

By interpreting the tolling provision as encompassing federal habeas petitions, however, the Second Circuit undermined AEDPA's purpose of promoting the finality of state court judgments without furthering any competing purpose of comity. *See Jiminez v. Rice*, 222 F.3d 1210, 1214 (9th Cir. 2000) ("Applying § 2244(d)(2) to a federal petition does nothing to further Congress's intent to promote exhaustion of state relief.").

If, as the Second Circuit held, tolling were permitted for federal habeas petitions, then habeas petitioners would be encouraged to make federal court their first stop. But in *Rose v. Lundy*, 455 U.S. 509 (1982), this Court construed pre-AEDPA sections 2254(b) & (c) to require a district court to dismiss federal habeas petitions containing both exhausted and unexhausted claims (*i.e.*, "mixed" petitions). *See Rose*, 455 U.S. at 522; *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("[A] state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to *any* of his federal claims.") (emphasis added). This rule requiring exhaustion of all claims in a federal petition was adopted with several purposes. One was to "encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error." *Rose*, 455 U.S. at 518-519. Another purpose was "to encourage habeas . . . petitioners to present the federal court with a single petition." *Id.* at 520. The Court in *Rose* reasoned that its total exhaustion rule would benefit "both the courts and the prisoners" to the extent it "reduces piecemeal litigation" and "provide[s] for a more focused and thorough review." *Id.*

Under the Second Circuit's interpretation, there would be no practical incentive, despite *Rose v. Lundy*, for a petitioner to evaluate his or her claims for exhaustion prior to filing in federal court, because the one-year limitations clock would freeze as soon as the federal petition was filed, fully exhausted or not. Moreover, if the petitioner wished to buy additional time prior to filing in state court, he or she simply could file a series of unexhausted petitions in federal court, tolling the statute indefinitely.

The Second Circuit's reading of the tolling provision as encouraging early filings of federal habeas petitions, *see Walker*, 208 F.3d at 360-61 (Pet. App. 8a), thus creates an incentive out of step with this Court's habeas jurisprudence. If, as the Second Circuit suggested, section 2244(d)(2) were intended to "reward" a petitioner who files any federal habeas petition by tolling the one-year period of limitation, *id.*, then a petitioner easily could "circumvent the limitations period imposed by the AEDPA," *Warren v. Garvin*, 219 F.3d 111, 114 (2d Cir.), *cert. denied*, 121 S. Ct. 404 (2000), by filing unexhausted claims in federal habeas petitions as a means of prolonging the review process. This clearly would undermine the very purpose of the total exhaustion "rule," *i.e.*, to reduce "piecemeal litigation" by presenting all of their claims to a federal court in "a single habeas petition." *Rose*, 455 U.S. at 520; *see also Harris v. Reed*, 489 U.S. 255, 269 (1989) (O'Connor, J., concurring) ("[T]he [exhaustion] rule furthers the interest in the efficiency of federal habeas corpus, by assuring that, in general, the factual and legal bases surrounding a petitioner's constitution claim or claims will have been developed in a prior adjudication.")

Such an interpretation, by encouraging early, ill-considered, or repeat federal habeas filings, moreover, would place a substantial burden on federal courts. "Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes." *McCleskey v. Zant,* 499 U.S. 467, 491 (1991). Indeed, in the year ending September 30, 1999, prisoners filed 23,821 habeas corpus petitions (not involving the death penalty) in the federal courts, comprising almost 10% of the total number of civil cases filed. *See* 1999 Director's Ann. Rep., Jud. Bus. of the U.S. 138, 140.

The broader ramifications of the burden that even readily dismissed petitions place on the federal courts and on petitioners with meritorious claims has long been recognized. In 1953, after 541 habeas petitions challenging state convictions had been filed in 1952, Justice Jackson criticized this Court's habeas decisions as enabling

> floods of stale, frivolous and repetitious petitions [to] inundate the docket of the lower courts and swell our own. Judging by our own disposition of habeas corpus matters, they have as a class become peculiarly undeserving. It must prejudice the occasional meritorious application to be buried in a flood of worthless ones.

Brown v. Allen, 344 U.S. 443, 536-37 & n.8 (1953) (Jackson, J., concurring in the result) (footnotes omitted); *see also Keeney v. Tamayo-Reyes,* 504 U.S. 1, 7 (1992) ("Federal habeas litigation also places a heavy burden on scarce judicial resources, may give litigants incentives to withhold claims for manipulative purposes, and may create disincentives to present claims when evidence is fresh."); *Schneckloth v. Bustamonte,* 412 U.S. 218, 260 (1973) (Powell, J., concurring) (same).

By encouraging the early and repeat filing of federal habeas petitions, therefore, the Second Circuit's interpretation would encourage delay and undermine the finality of state court convictions, without advancing any principles of exhaustion and comity, while also burdening scarce federal judicial resources and federal petitioners with meritorious claims. This is contrary to the goals and purposes of AEDPA. The Second Circuit's interpretation of the tolling provision must be rejected under the plain language of the statute, principles of statutory construction, and the values and purposes underlying AEDPA.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

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IN THE

Supreme Court of the United States

GEORGE DUNCAN, Superintendent,
Great Meadow Correctional Facility,
Petitioner,

v.

SHERMAN WALKER,
Respondent.

On Writ of Certiorari to
The United States Court of Appeals
for the Second Circuit

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PETITIONER'S QUESTION PRESENTED

Whether a prior federal habeas corpus petition is an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. §2242(d)(2), which provides that the one-year statute of limitations for federal habeas corpus petitions set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA") is tolled during the pendency of such an application.

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RESPONDENT'S STATEMENT OF THE CASE

Introduction

One of the several changes Congress made to federal habeas proceedings in the Antiterrorism and Effective Death Penalty Act, (hereinafter "AEDPA"), was the creation of a one year statute of limitations for habeas corpus petitions filed by state prisoners. 28 U.S.C. § 2244.[1] The limitations provision requires habeas petitioners, in most circumstances, to file their federal petitions within one year of the time their state convictions become final on direct review. 28 U.S.C. § 2244(d)(1)(a).[2] The statute provides that the limitations period is tolled during the pendency of "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim". 28 U.S.C. § 2244(d)(2). *See also Artuz v. Bennett,* 121 S.Ct. 361, (2000) This case presents the specific question whether the filing of a petition for a writ of habeas corpus in federal district court is an application for "State post-conviction or other collateral review" thereby tolling the limitations period. That question necessarily involves a determination whether a petition containing unexhausted claims is, nonetheless, an application for habeas corpus relief, satisfying AEDPA's requirement that the application be filed in federal court within one year.

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[1] The AEDPA creates a shorter limitations period for state capital offenders in "opt in" jurisdictions, *see* 28 U.S.C. §2263(a), which is not in issue in this case.

[2] There are certain other "triggering mechanisms" which commence the limitations period, e.g., newly discovered evidence, new rules of law, and the termination of state impediments to filing. *See* §2244(d)(1). These other initiating events are also not at issue in this case.

Prior Proceedings

Respondent entered a guilty plea to the charge of Robbery in the First Degree on June 6, 1992, in Queens County, New York Supreme Court. He was sentenced to a seven to fourteen-year indeterminate term of incarceration. He raised four claims on direct appeal to New York's intermediate appellate court: (1) a violation of *People v. Rosario*, 173 N.E.2d 881(N.Y.), *cert, denied*, 368 U.S. 866 (1961) arising from the prosecution's failure to turn over a witness' statement; (2) an abrogation of his Sixth Amendment right to counsel at a police-arranged lineup; (3) a due process violation as a result of a suggestive lineup; and (4) an argument that the imposed sentence was excessive. Respondent's conviction was affirmed on June 12, 1995. *People v. Walker*, 628 N.Y.S.2d 950 (N.Y. App. Div. 1995).(App. 30a-46a) The New York Court of Appeals dismissed Respondent's application for leave to appeal on January 15, 1996. *People v. Walker*, 664 N.E.2d 519 (N.Y.1996).(App. 95a-96a) Respondent did not seek a writ of certiorari. Therefore, his conviction became final on April 15, 1996.

While Respondent's application for leave to appeal was pending in the New York Court of Appeals, he sought a *writ of error coram nobis* from the Appellate Division. His *pro se* application alleged that he was denied the right to the effective assistance of appellate counsel due to counsel's failure to investigate the veracity of information given to law enforcement by a confidential informant and by the New York Legal Aid Society's withdrawal as counsel of record because it had previously represented the confidential informant. The application was denied on March 18, 1996. *People v. Walker*, 639 N.Y.S. 2d 932 (N.Y. App. Div. 1996).(App. 148a-149a)

On April 10, 1996, Respondent, *pro se*, filed a single document in the United Stated District Court for the Eastern

District of New York containing both a claim under 42 U.S.C. § 1983 and claims for federal habeas relief pursuant to 28 U.S.C. § 2254. On July 12, 1996, the federal district court dismissed Respondent's petition without prejudice. *Walker v. Legal Aid Society, et al.* No. 96 Civ. 2946, 1996 U.S. Dist. LEXIS 22492, at *4 (E.D.N.Y., July 12, 1996) (App. 20a) The court did so because it was "not apparent that Respondent had exhausted all of his state remedies.".

On May 22, 1997, Respondent, still *pro se*, and without having returned to state court, filed a federal petition for habeas corpus containing all exhausted claims. Applying the then prevailing law in the Second Circuit, *see Peterson v. Demskie*, 107 F.3d 92 (2d Cir. 1997) the district court dismissed Respondent's petition as untimely, holding that Respondent had failed to file in federal court within a "reasonable time" of AEDPA's April 24, 1996 enactment.[3] *Walker v. Artuz*, 1998 WL 355398 (E.D.N.Y., May 6, 1998).

The Second Circuit granted Respondent a Certificate of Appealability on December 1, 1998, appointed counsel and certified two questions for review: the first of which concerned whether Respondent's "first petition . . . tolled the period of limitations set forth in 28 U.S.C. § 2244(d)(2); the second question concerned whether equitable tolling was appropriate "where the prior, timely-filed section 2254

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[3] Respondent's conviction became "final" several weeks prior to the enactment of AEDPA. Initially, as noted above, the Second Circuit held that such petitioners had a "reasonable time" to file in federal court. Subsequently, however, the Second Circuit (and most other federal circuit courts of appeal), determined that individuals whose convictions were final prior to AEDPA's April 24, 1996 enactment, were entitled to a one year grace period. *See Ross v. Artuz*, 150 F.3d 97, 100-02 (2d Cir. 1998) *United States v. Flores*, 135 F.3d 1000, 1006 (5th Cir. 1998) *Calderon v. United States District Court*, 128 F.3d 1283, 1287 (9th Cir. 1998), *cert. denied*, 522 U.S. 1099 (1998) *United States v. Simmonds*,11 F.3d 737, 746 (10th Cir. 1997)

petition was dismissed without prejudice for failure to exhaust all claims . . ." (App. 21a-22a). On March 27, 2000, the Second Circuit Court of Appeals reversed the decision of the district court, holding that § 2244(d)(1)'s one-year statute of limitations was tolled while Respondent's mixed petition was pending in the district court.

Construing the statutory language, the Second Circuit court reasoned that the limitations period is tolled during the time a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. §2244 (d)(2) In the Second Circuit court's view, the plain meaning of the statute compelled a determination that a federal habeas petition is an application for "collateral review". 208 F.3d at 359. While the court stated that it is possible to interpret the word "State" in Section 2244(d)(2) to modify both "post-conviction" and "other collateral", it determined that "[c]lose analysis of the statute's language, however shows that 'State' modified only the word 'post-conviction', and the phrase 'other collateral' is to be given its naturally broader meaning." *Walker v. Artuz*, 208 F.3d 357, 359 (2d. Cir. 2000). The construction urged by the government was, in the Second Circuit court's view, "ungainly." *Id.* The panel stated:

> We choose to adopt an interpretation that gives full meaning to the phrase "State post-conviction review", which means federal habeas petitions. As the district court held in *Barrett*, "State post-conviction review" means all collateral review of a conviction provided by a state", and the phrase "other collateral review" would be meaningless if it did not refer to federal habeas petitions. *Barrett* 63 F. Supp. 2d, at 1250

Id. at 360. The court further held that its conclusion was consistent with the overall objective of the AEDPA "because the statute of limitations remains enforceable and intact. Our interpretation merely avoids penalizing state prisoners who

properly have filed federal habeas petitions and are awaiting a response from the court." *Id.* The court also stated that its interpretation of Section 2244(d)(2) would "reward petitioners for filing their federal petitions as soon as possible, thus promoting the statutory objective of efficiency in the review of state court judgments" and lead to "speedier completion of collateral review". *Id.* at 360-61. The *Walker* court rejected the position urged by the government on appeal, and again in this Court, as unfair. Citing *Kethley v. Berge,* 14 F. Supp 2d 1077, 1079 (E.D. Wis.1998) the Second Circuit Court of Appeals stated:

> In the Wisconsin case of *Kethley v. Berge*, the district court indeed held that "time is not tolled while an improperly filed federal habeas petition is gathering dust on district court shelves" pursuant to Section 2244(d)(2). *See Kethley v. Berge*, 14 F.Supp. 2d 1077, 1079 (E.D. Wis. 1998). However, the Wisconsin court also recognized the inequity resulting from its interpretation, stating that "the procedural dismissal of petitioner's action in the present case should not later be construed to produce the unintended effect of barring federal habeas review under the AEDPA statute of limitations provision." *Id.*

Id. at 361. Because the Second Circuit Court of Appeals decided that Respondent's federal petition tolled the limitations period, it "did not reach his alternative [equitable tolling] argument." *Id.*

The Second Circuit's holding was recently embraced by the Tenth Circuit Court of Appeals in its decision *Petrick v. Martin,* 263 F3d. 624, (10th Cir. 2001), WL8313, 2001 (10th Cir. [Okla.] Jan. 03, 2001) (No. 99-6399). However, the Third, Fifth and Ninth Circuits each have narrowly construed the statute to exclude federal habeas petitions from tolling the limitations period. *See, Jones v. Morton,* 195 F.3d 153 (3d

Cir. 1999); *Grooms v. Johnson*, 208 F.3d 489 (5th Cir. 1999); *Jimenez v. Rice*, 222 F.3d 1210 (9th Cir. 2000).

On November 13, 2000, this Court granted the government's application for a writ of certiorari to resolve the conflict among the circuit courts. 121 S.Ct. 480 (2000), 69 USLWW 3310 (No. 00-121).

SUMMARY OF ARGUMENT

The Second Circuit's holding in the case below, embraced by the Tenth Circuit in *Petrick v. Martin, supra.*, that the one-year statute of limitations established by 28 U.S.C. § 2244(d)(1) is tolled during the pendency of an application for federal habeas relief, is supported by the plain reading of the statute, the traditional canons of statutory construction, the concomitant principles of exhaustion and comity, and by the policy underlying the enactment of the AEDPA.

The basic rules of grammar and statutory construction require that phrases on opposite sides of the disjunctive "or" be given their separate meanings. Because the terms "post-conviction" review and "collateral review" are often used interchangeably by practitioners and courts alike, the phrase "other collateral review" has very little meaning if it does not include federal habeas petitions. The interpretation urged by the government would require this Court to rewrite the statute to include the word "State" immediately before the second part of the disjunctive, "other collateral review".

The government's contention that "other collateral review" refers only to those atypical proceedings that are not post-conviction in nature, such as mental health confinements, urges this Court to ignore the ordinary and customary meaning of the terms "post-conviction" and "collateral review". Those terms conventionally refer to habeas corpus or judicial orders issued after a conviction becomes final. Certainly, the phrase "other collateral review" is broad

enough to encompass such proceedings *and* federal habeas corpus petitions.

The statute of limitations was satisfied when Respondent filed his first petition for habeas relief within one year of his state court conviction becoming final. If the limitations clock continued to run during the period his petition was pending in federal district court, he would be penalized for complying with the statute. By encouraging state prisoners to file their applications for federal habeas relief within one-year of their convictions becoming final, the principles of comity and exhaustion are facilitated. Federal district courts are often helpful to habeas petitioners, the vast majority of whom are *pro se*, by advising whether a claim needs to be further addressed by the state courts.

The Second Circuit's holding comports with and furthers Congress' goals in the enactment of the AEDPA. Because state prisoners have no ability to influence whether or not their applications will be heard swiftly, the Second Circuit's ruling is the only fair interpretation of the statute. Congress did not intend to eliminate the right of federal habeas review to prisoners who file timely applications, even if they contain unexhausted claims.

Finally, the Second Circuit's holding does not encourage state prisoners to circumvent the statute of limitations by filing petitions that contain unexhausted claims. Section 2254(b)(2) enables a district court to deny a petition on the merits, even if it contains unexhausted claims. The real possibility that a state prisoner's petition may be dismissed on the merits, thus requiring that he seek leave to file a second or successive petition, is certainly not a risk most would take.

The judgment of the Second Circuit should be affirmed.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY CONSTRUED THE PLAIN LANGUAGE OF THE SECTION 2244(D)(2) TO INCLUDE PRIOR PETITIONS FOR WRITS OF HABEAS CORPUS.

The Second Circuit held that federal petitions for writs of habeas corpus are included in the phrase "State post-conviction or other collateral review". 28 U.S.C. § 2244(d)(2). By applying traditional canons of statutory construction, including both a natural reading and contextual analysis of the statute, the Second Circuit's ruling ensured Respondent's right to one full review of his constitutional claims by the federal courts. In so ruling, the Second Circuit remained faithful to the common law of habeas corpus and simultaneously furthered Congress' goals in enacting the AEDPA.

The Second Circuit held that the one-year limitations period was tolled during the time Respondent's unexhausted petition was pending in federal court. *Walker,* 208 F.3d at 361-62. The court so ruled by analyzing § 2244(d)(2), which states:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

The panel construed the phrase, "[s]tate post-conviction or other collateral review" to include federal habeas petitions. 208 F.3d at 359-61. Thus, the court held that Respondent's unexhausted petition stopped the limitations clock. *Id.* A closer examination of the Second Circuit's decision in Respondent's case, as well as the Tenth Circuit's decision in *Petrick v. Martin,* 2001 WL 8313 (10th Cir., Jan. 3, 2001), agreeing with the Second Circuit, must result in an affirmance.

The Second Circuit held that the statutory limitations period was tolled during the pendency of a federal petition ultimately dismissed due to uncertainty about its exhaustion status. In the court's view, a federal petition was an "application for State post-conviction or other collateral review" satisfying Section 2244(d)(2)'s tolling requirement. In finding so, the court addressed the Third Circuit's conclusion to the contrary, in *Jones v. Morton*, 195 F.3d 153 (3rd Cir. 1999).

Jones held that the word "State" should be read to modify both "post-conviction" and "other collateral review", thus affording tolling "for various forms of state review only." 195 F.3d at 159. The Second Circuit acknowledged that "[i]t is possible to interpret 'State' in Section 2244(d)(2) to modify both 'post-conviction' and 'other collateral,'" 208 F.3d at 359, but concluded that "[c]lose analysis of the statute [sic] language, however, shows that 'State' modifies only the word 'post-conviction,' and the phrase 'other collateral' is to be given its naturally broader meaning." *Id.* In fact, in the panel's view, "applying 'State' to both of the disjunctive phrases would create a linguistic oddity because the statute would refer to 'a properly filed application for 'State post-conviction'. . . review or 'State . . . other review.' " *Id.* at 361. The Second Circuit Court of Appeals explained:

> "State other collateral review" is an ungainly construction that we do not believe Congress intended. If Congress had intended the meaning that the *Sperling* court imputed, it might more naturally have written "a properly filed application for State post-conviction or collateral review." We chose to adopt an interpretation that gives full meaning to the phrase "State post-conviction review," which includes all state remedies, and the phrase "other collateral review," which means federal habeas petitions.

208 F.3d at 360.[4]

The Tenth Circuit found the Second Circuit's opinion in this case "more persuasive" than the contrary decisions of several other courts, agreeing that "the language of the statute is best read as tolling the limitations period for 'State post-conviction review,' or 'other collateral review,' including federal habeas review." *Petrick*, 2001 WL 8313 at *3. The *Petrick* court also looked to the statute of limitations Congress enacted for capital cases in opt-in jurisdictions, 28 U.S.C. § 2263(b)(2), for confirmation of its parsing of the statutory language. There, the court noted, "Congress indicated that 'other collateral relief' included only state remedies." *Id.* at *3. Section 2263 (b)(2) was thus "some indication that Congress did not intend to limit 'other collateral review' in § 2244(d)(2) to state remedies." Id.[5]

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[4] The court also rejected the argument that "State post-conviction review" means judicial remedies, and "other collateral review" refers to non-judicial remedies such as clemency. *Id.* at 360. The panel correctly recognized that both post-conviction and collateral review "conventionally refer to habeas corpus, coram nobis and similar writs of judicial orders that courts issue." *Id.* The Tenth Circuit agreed, holding that "other collateral review" is "virtually meaningless if it is read to include only state remedies other than state post-conviction review." *Petrick*, 2001 WL at *3. According to the *Petrick* court, " 'State post-conviction review" is a broad term that can encompass all review a prisoner seeks after conviction and we see no reason to believe that Congress should have believed that there were other forms of state 'collateral review' that did not come within the scope of 'post-conviction review.' " *Id.*

[5] The Tenth Circuit also stated that its interpretation of § 2244(d)(2) was consistent with "the inapplicability of the successiveness rule to a federal petition filed after an initial federal petition is dismissed for failure to exhaust state remedies." *Id.* at *4; *See also, Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998) As this Court explained, "[n]ot barring a second, post-conviction petition as successive would offer little solace to the petitioner whose second petition is dismissed because the

The panel in Respondent's case also concluded that its interpretation of § 2244(d)(2) was consistent with the purposes of the limitations period because it "will reward petitioners for filing their federal petitions as soon as possible, thus promoting the statutory objective of efficiency in the review of state criminal judgments." 208 F.3d at 36-61. The court also recognized the extreme unfairness of allowing the limitations period to run while an unexhausted petition was pending in federal court because, in many cases, the construction of § 2244(d)(2) urged by the government would "produce the unintended effect of barring federal habeas review." *Id.* at 361 (quoting *Kethley v. Berge*, 14 F.Supp. 2d 1077 (E.D. Wi 1998). The panel stated: "Our interpretation merely avoids penalizing state prisoners who have properly filed federal habeas petitions and are awaiting a response from the federal court." 208 F.3d at 361. Again, the Tenth Circuit agreed fully: "A contrary interpretation of § 2244(d)(2) would mean that a diligent prisoner who filed his federal petition the very day after his state conviction became final could still be permanently barred from habeas relief if the district court delayed before dismissing the petition for failure to exhaust." *Petrick*, *supra.*, 2001 WL 8313 at *4.

The Second and Tenth Circuits' reading of § 2244(d)(2) is fully supported by fundamental canons of statutory construction. Reading the phrase "other collateral" to include federal habeas proceedings gives the most sensible meaning to an arguably unclear piece of statutory language. Furthermore, this interpretation of the statutory language is powerfully bolstered by Congress' use of different and more pointed language in § 2263(b)(2) to restrict the availability of tolling to state court proceedings.

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limitations period ran while the first petition was pending in federal court." *Id.*

"We start, as always, with the language of the statute." *Williams v. Taylor*, 520 U.S. 420, 431 (2000); *see also United States v. James*, 478 U.S. 597, 604 (1986). Here, that language provides for tolling of the limitations period during the pendency of an application for "State post-conviction or other collateral review. . ." § 2244(d)(2). The phrase is divided down the center by the disjunctive "or", with "State post-conviction" on one side of the divide, and "other collateral review" on the other. A natural reading of the language yields the conclusion that the word "review" operates as the subject of both "State post-conviction" and "other collateral", such that § 2244(d)(2) as a whole refers to applications for both "State post-conviction review" and "other collateral review." [6]

The precise role played by the word "State" is less clear. As both the Second and Tenth Circuits acknowledged, "[i]t is *possible* to interpret the word 'State' . . . to modify both 'post-conviction' and 'other collateral.'" *Walker*, 208 F.3d at 359 (quoted approvingly in *Petrick*, *supra.*, 2001 WL 8313 at *3) (emphasis added). As both courts went on to conclude, however, that interpretation is, for several reasons, not the best alternative. As a practical matter, reading "State" to modify "other collateral review" does not produce a linguistically comfortable result, i.e., "application for State . . . other collateral review."

More importantly, the ordinary requirement that statutory "terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise," *Reiter v. Sonotone Corp., et al*, 442 U.S. 330, 338-339 (1979) (citing *FCC v. Pacifica Foundation*, 438 U.S. 726, 739-40 (1978)),

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[6] That the word "review" performs this function in § 2244(d)(2) is confirmed by the fact that neither "State post-conviction" nor "other collateral" convey any functional meaning in the absence of a subject, like "review".

is frustrated by reading "State" to modify "other collateral". This Court's own usage of the terms indicates that "post-conviction review" and "collateral review" can mean the same thing.[7] Thus, the only method by which to supply independent meaning to the phrases occupying opposite sides of § 2244(d)(2)'s disjunctive "or" is by use of distinguishing adjectives, "State" and "other". For these adjectives to actually give the requisite independent meaning to the terms "post-conviction review" and "collateral review", the meanings of the adjectives themselves must necessarily be distinct. "State" must mean exactly what is says, and "other" must refer to all forms of collateral review "other" than "State post-conviction review".[8] *See Petrick, supra.*, 2001 WL 8313 at *3 (agreeing with the Second Circuit "that 'other collateral review' is virtually meaningless if it is read to only include state remedies other than state post-conviction review"). Federal habeas corpus proceedings certainly fall within any sensible definition of "other" collateral review.

The government's contention that "other collateral review" refers strictly to the purportedly "wide variety of State 'collateral review' that is not 'State post-conviction' review", Pet. Br. 21, is wholly unpersuasive for two reasons. First, had this been Congress' intention, there would have been no need to include a reference to "post-conviction" review at all since,

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[7] *See, e.g. Williams*, 529 U.S. at 433 (prisoner "had not developed the facts of his claim in *state collateral proceedings*, an omission caused by the negligence of his state *post-conviction* counsel")(emphasis added); *Lewis v. Casey*, 518 U.S. 343, 377 (1996) (discussing previous decisions rejecting claims of constitutional entitlement to state-appointed counsel in "State collateral proceedings" and "state post-conviction proceedings").

[8] Ascribing these independent meanings to the adjectives "State" and "other" and in turn to the otherwise practically indistinguishable terms they describe, also avoids offending the well settled principle of statutory construction that the language of a statute "must be interpreted, if possible, to give each word some operative effect." *Walters v. Metro. Educ. Enter., Inc.*, 117 S.Ct. 660, 664 (1997).

by the government's own reading, " 'post-conviction' review is a subset of 'other collateral review.' " *Id.* The government's interpretation ignores the familiar maxim that the language of a statute "must be interpreted, if possible, to give each word some operative effect." *Walters, supra.* Second, the government's attribution to Congress of an intent to use "other collateral review" merely to refer to challenges to pre-trial detention or commitments to mental health institutions is at odds with the government's own articulation of Congress' purpose in enacting § 2244(d): "The statute of limitations enacted in AEDPA was written to balance twin goals of comity in tension [sic], i.e., to balance the goal of reducing delays to the finality of state *convictions* with the goal of ensuring full exhaustion of state court remedies." Pet. Br. 33 (emphasis added). Surely a legislature in pursuit of such well-defined, state conviction-oriented objectives would not take such an indirect approach to ensuring the availability of tolling during the types of relatively unusual non-post-conviction proceedings identified by the government. And even if Congress did have such proceedings in mind, it would be reasonable to assume that Congress would have chosen language less susceptible to an alternative interpretation than the phrase "other collateral review".

That Congress intended § 2244(d)(2)'s phrase "State post-conviction or other collateral review" to encompass federal habeas proceedings is confirmed by Congress' treatment of the question of tolling in § 2263(b)(2), which provides that "the time requirements established by subsection (a) shall be tolled *** from the date on which the first petition for post-conviction review or other collateral relief is filed until the final *State court* disposition of such petition[.]" Unlike § 2244(d)(2), the plain language of § 2263(b)(2) makes explicitly clear that tolling for "post-conviction review or other collateral relief" is unavailable at any point beyond "the final State court disposition" of a prisoner's challenge. As this Court observed in another decision concerning

inconsistency between Chapters 153 and 154 of the AEDPA, "[n]othing, indeed, but a different intent explains the different treatment." *Lindh v. Murphy*, 521 U.S. 320, 329 (1997). Simply put, had Congress desired to restrict tolling under § 2242(d)(2) to only the time during which *state* proceedings remain pending, it would have done so expressly, just as it did in § 2263(b)(2).[9] The fact that Congress did not do so is solid evidence of its intent *not* to impose any such restriction, but to instead, include federal habeas review, and any other "collateral review" within the class of proceedings by which §2244(d)(2)'s tolling mechanism is triggered.[10]

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[9] *See, e.g., Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (quoting *Russello v. United States*, 464 U.S. 16 (1983) (internal quotation marks omitted)(" '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'"); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) ("Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did it expressly"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 (1975) ("When Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly").

[10] The government contends that "[i]t defies logic to believe that Congress intended to allow for unexhausted federal habeas petitions to toll the limitations period in all cases *except* capital cases, where the consequences of constitutional error are of the highest potential order of gravity." Pet. Br. 27. While the government's sentiments with respect to the theoretical importance of heightened scrutiny in capital cases are appealing in the abstract, there can be no doubt that *reduction* of procedural safeguards in favor of increasing the pace of capital collateral litigation was precisely what Congress intended. *Compare* § 2244(d)(1) (imposing one-year limitations period for habeas corpus petitions generally) *with* § 2263(a) (imposing 180 day limitations period for death-sentenced prisoners); *see* §2266(b)(1)(A) (mandating entry of "final judgment on any application for a writ of habeas corpus brought . . . in a capital case not later than 180 days after the date on which the application is filed"); *see, e.g., Lindh v. Murphy*, 521 U.S. at 331 (describing the

II. THE LIMITATIONS PERIOD IS SATISFIED WHEN AN APPLICATION FOR A WRIT OF HABEAS CORPUS IS FILED WITH THE FEDERAL COURT.

Even if this Court finds that the canons of statutory construction do not support the Second Circuit Court of Appeals' ruling, the plain language of the first part of the statute, § 2244(d)(1), logically leads to the conclusion that Congress intended for the limitations clock to stop once the petition is filed in federal court. Common sense requires that this provision be read to mean that the statutory limitations period cannot run after its primary requirement—the filing of the habeas petition—is satisfied.

Section 2244(d)(1) reads, in relevant part, "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." By its plain terms, § 2244(d)(1)'s language establishes a single, unambiguous requirement for a state prisoner who intends to pursue his federal habeas corpus remedies: he must file an "application for a writ of habeas corpus" within one year of the relevant triggering event.[11] "Grace period" petitioners like Respondent were required to

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function of Chapter 154: "In general terms, applications will be expedited (for a State's benefit) when a State has made adequate provision for counsel to represent indigent habeas applicants at the State's expense"); *Green v. Johnson*, 116 F.3d 1115, 1119 (5th Cir. 1997) (AEDPA created "a new chapter 154 with special rules favorable to the state.")

[11] For prisoners like Walker, whose convictions "became final" prior to the AEDPA's April 24, 1996 effective date, a one year "grace period" applies, pursuant to which the limitations clock begins to run on the Act's effective date, but may be tolled by the same means available to other prisoners. *See, e.g., Ross v. Artuz*, 150 F.3d 97, 100-02 (2d Cir. 1998); *Wilcox v. Florida Department. of Corrections*, 158 F.3d 1209, 1210 (11th Cir. 1998) (*per curiam*); *Nichols v. Bowersox*, 172 F.3d 1068 (8th Cir. 1999) (*en banc*); *Rogers v. United States*, 180 F.3d 349, 355 (1st Cir. 1999).

file their petitions by April 24, 1997. The statute requires nothing more.

Respondent's April 10, 1996 petition clearly satisfied § 2244(d)(1)'s only requirement. While his petition was subsequently dismissed "without prejudice" due to questions about whether all claims were exhausted, *see Walker v. Artuz*, 208 F.3d 357, 358 (2d Cir. 2000), it was still undoubtedly an "application for a writ of habeas corpus". This Court has never suggested that a petition containing unexhausted claims is not an application for a writ of habeas corpus, or that such a petition is somehow jurisdictionally defective. *See, e.g., Granberry v. Greer*, 481 U.S. 129, 131 (1987) ("failure to exhaust state remedies does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application"); *Rose v. Lundy*, 455 U.S. 509, 513-514 (1982) (referring to "petition" containing "both exhausted and unexhausted claims"); *see also, e.g., Strickland v. Washington*, 466 U.S. 668, 684 (1984) ("exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional"). Rather, it has always been clearly understood that a mixed, or in this case, arguably mixed, petition is still an application for a writ of habeas corpus.

Likewise, the AEDPA contains no provision suggesting, or even implying, that a petition containing unexhausted claims either fails to constitute an application for habeas relief, or fails to confer jurisdiction on the federal court. On the contrary, § 2254(b), which contains the AEDPA's exhaustion requirement, clearly and specifically contemplates the filing of an "application for a writ of habeas corpus" containing unexhausted claims, and sets forth the alternatives available to a federal court faced with such a petition. *See* § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"); *see*

also § 2254(b)(1) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that – (A) the applicant has exhausted the remedies available in the courts of the State . . .").

In light of Congress' awareness that habeas petitions that do not satisfy § 2254(b)(1)'s total exhaustion rule are sometimes filed, and its decision to address that subcategory of petitions specifically through § 2254(b)(2), the absence of any express exception for unexhausted or mixed petitions anywhere in § 2244(d) is very significant. If Congress intended either to change the long-established understanding that a mixed petition is still a petition, or to ensure that the limitations period would run during the pendency of a mixed or arguably mixed petition, it would have made that intention clear. *See Thompson v. United States*, 246 U.S. 547, 551 (1918) ("we cannot doubt that if the Congress had intended . . . to change the law, as evidenced by the *Whitefield [v. United States*, 92 U.S. 165(1875)] decision, of which we must assume that it had full knowledge. . . it would have done so in plain terms, especially in a manner of such great importance as we have here. . ."); *cf., Conroy v. Aniskoff*, 507 U.S. 511, 516 (1993) (presuming Congress' familiarity with decisions relating to statute under consideration).

Had Congress intended as the government contends, § 2244(d)(1) would have been drafted to say, "A 1 year period of limitations shall apply to an application for a writ of habeas corpus satisfying the total exhaustion rule . . . [or containing only exhausted claims]." The fact that Congress did not do so, especially after having taken specific action to address a closely related occurrence in § 2254(b)(2), is powerful evidence that Congress simply did not envision the limitations clock running during the pendency of a habeas

petition, exhausted or not.[12] Thus, regardless of whether all of the claims contained in Respondent's April 10, 1996 petition were exhausted, it was an "application for a writ of habeas corpus" which satisfied, and therefore stopped, § 2244(d)(1)'s limitations clock. Simply put, Respondent made it to federal court within one year of the relevant triggering event. The AEDPA does not require anything more. Once satisfied, the limitations period ceased to run while Respondent's case was pending in the district court.[13]

There are other compelling considerations which indicate that § 2244 (d)(1)'s limitations period is suspended during the pendency of a mixed application for habeas relief that is subsequently dismissed without prejudice. This Court has long recognized "the power of the federal courts to hold that "[a] statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *American Pipe*

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[12] *Cf. Gonzlon-Peretz v. United States, supra.*, quoting *Russello v. United States, supra; Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 305-306 (1993) (Thomas, J., dissenting, joined by Blackmun and O'Connor, JJ.) ("Courts should not treat legislative and administrative silence as a tacit license to accomplish what Congress and the SEC are unable or unwilling to do").

[13] Any doubt about the correctness of this understanding of §2244(d)(1) evaporates upon consideration of exactly how the limitations period would work under the government's theory. If the filing of an "application for a writ of habeas corpus" does not stop (or, in this case, prevent the start of) the limitations clock, then that clock would never stop. Instead, it would run until the conclusion of habeas proceedings regardless of the application's exhaustion status; or, if those proceedings continued for more than one year, until the expiration of the one year limitations period, at which time the otherwise proper (and once timely) habeas petition would become untimely and dismissal with prejudice would be required. This simply cannot be what Congress intended. *See, e.g., Sheridan v. United States*, 487 U.S. 392, 402 n.7 (1988) (courts should strive to avoid attributing absurd designs to Congress, particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading.").

& Construction Co. v. Utah, 414 U.S. 538, 559 (1974); *see also id.*, at 558. ("In recognizing judicial power to toll statutes of limitation in federal courts we are not breaking new ground"). This power exists both where Congress has been silent on the question of tolling, as well as where "Congress has specified a precise limitations period, and further has provided for a tolling period in the event that [specified] litigation is instituted." *Id.* at 556.[14] As discussed more fully below, in the habeas context, a determination that the filing of a habeas petition subsequently dismissed without prejudice suspends the running of the limitations period is not only consistent with the "legislative purpose" underlying § 2244(d) and the rest of the AEDPA, it is essential to the orderly and fair administration of habeas corpus proceedings.[15]

Aside from the plain language and logical function of the limitations period described above, the most compelling reason for suspending the running of the limitations period during the pendency of an unexhausted or mixed petition is

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[14] Application of the rules embodied in *American Pipe* is particularly appropriate in a case like this one, where there exists "a substantial body of relevant procedural law to guide the decision to toll the limitations period, and significant underlying federal policy that would . . . conflict[] with a decision not to suspend the running of the statute." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975).

[15] This Court has addressed the issue of whether to toll a federal limitations period during the pendency of a procedurally defective pleading at least once before. In *Burnettt v. New York Central Railroad Co.*, 380 U.S. 424 (1965), which presented a question of timeliness under the limitations period governing actions under the Federal Employers' Liability Act (FELA), the Court held that "when a plaintiff begins a timely FELA action in a state court of competent jurisdiction, service of process is made upon the opposing party, and the state court action is dismissed because of improper venue, the FELA limitation is tolled during the pendency of the state action." *Id.* at 428. The logic which dictated the Court's resolution of the question presented in *Burnettt* applies with equal force here.

the perverse consequences that would flow from the failure to do so. Like limitations periods in other contexts, §2244(d) must be predictable, and capable of satisfaction by a person of common intelligence exercising ordinary diligence in attempting to comply with its requirements. *See, e.g., Wilson v. Garcia*, 471 U.S.261, 275 (1985); *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 150 (1987). However, permitting the limitations clock to run during the pendency of a habeas petition, filed in good faith but subsequently dismissed for non-exhaustion, introduces an unacceptable and unfair level of uncertainty. Under such a scheme, a petitioner could never be assured that his federal habeas petition was timely filed. Control over the timeliness of prisoners' petitions would be removed from the prisoners themselves and placed in the hands of overworked judges with no mandate to process petitions uniformly or expeditiously.

For example, two prisoners incarcerated in the same federal district, whose convictions became final on the same date, who both filed mixed (or arguably mixed) petitions containing identical claims, could receive very different treatment. One prisoner's petition could be assigned to a judge who reviews the application and dismisses it for failure to exhaust within thirty days of filing. That petitioner would have ample opportunity to return to state court and then pursue his federal remedies. If the other prisoner's application is assigned to an overburdened and understaffed judge, who takes thirteen months to review and dismiss his petition "without prejudice", he would be "out of time", although he did nothing wrong. Under the government's reading of §2244(d), he would be stripped of the opportunity to ever secure federal review of his conviction or sentence.[16]

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[16] A number of prisoners around the country have actually suffered this fate. *See, e.g. Jones v. Morton*, 195 F.3d 153, 158 (3d Cir. 1999) (petition rendered untimely when nearly ten month period during which mixed

It is simply no answer to place the onus on the prisoner to make certain his petition contains only exhausted claims, on penalty of possible forfeiture of his right to ever obtain federal habeas review. The requirements of exhaustion and fair presentation, as to both legal claims and factual allegations, frequently pose genuinely difficult questions which are debatable by knowledgeable attorneys and experienced judges. *See, e.g., Evici v. Commissioner of Corrections*, 226 F.3d 26, 28 (1st Cir. 2000) (vacating district court's dismissal for exhaustion, and remanding for further proceedings); *Morgan v. Bennett*, 204 F.3d 360, 369 (2nd Cir. 2000) (disagreeing with district court's conclusion that claim had not been adequately presented to state courts and remanding for merits consideration); *Mercadel v. Cain*, 179 F.3d 271, 275 (5th Cir. 1999) (vacating district court's denial of relief on merits and remanding for dismissal without prejudice to permit petitioner to exhaust available state remedies); *Bear v. Boone*, 173 F.3d 782 (10th Cir. 1999) (reversing district court's non-exhaustion ruling and remanding for merits review).

Frequently, habeas petitioners' representations that their claims are exhausted are challenged by the government, and reviewing courts, in the spirit of comity (which animated this

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petition lay dormant in district court was included in limitations calculation); *Pedraza v. State of Oklahoma*, 1999 WL 644814 at *1 (10th Cir. Aug. 25, 1999) (properly exhausted petition found time-barred as result of court's refusal to exclude from limitations period approximately eight months during which previous, unexhausted petition, remained pending in district court); *Harrison v. Galaza*, 1999 WL 58594 at *2 (N.D. Cal. Feb. 4, 1999) (dismissing petition as untimely after concluding that 338 days during which initial, unexhausted petition was pending in district court could not be excluded from limitations period); *Vincze v. Hickman*, 1999 WL 98330 (E.D.Cal. Jan.13, 1999) (dismissing petition as untimely after concluding that post-Act portion of more than two year period in which initial, unexhausted petition was pending in district court would not be excluded from limitations period).

Court's holding in *Rose),* often resolve these disputes in favor of dismissal without prejudice for failure to exhaust. *See, e.g. Snowden v. Singletary,* 135 F.3d 732, 737 (11th Cir. 1998), *cert. denied,* 119 S.Ct. 405 (1998) ("Federal courts may apply state rules about procedural bars to conclude that further attempts at exhaustion would be futile. This step should not be taken if there is a reasonable possibility that an exception to the procedural bar may still be available to the petitioner"); *Banks v. Horn, 126* F.3d 206 (3rd Cir. 1997) (dismissing for lack of exhaustion where possibility existed that procedurally barred claim could receive state court review under state law miscarriage of justice exception).

Moreover, the government's reading of § 2244(d) causes the once innocuous and prudential practice of erring on the side of dismissal "without prejudice" to become a trap in which hapless prisoners will unwittingly forfeit their right to federal review. Were this Court to ratify the government's view, the longstanding rule of *Rose v. Lundy, supra,* would be seriously jeopardized. In *Rose,* this Court observed that the "total exhaustion rule. . . *does not unreasonably impair the prisoner's right to relief . . .*" *Rose,* 455 U.S. at 522 (emphasis added). The acceptance of the government's view of § 2244(d), however, would in fact create a very real impairment of prisoners' rights to federal review. In cases presenting close questions of exhaustion, fair-minded federal judges would very likely begin resolving those questions, correctly or incorrectly, in favor of finding that the exhaustion requirement has been satisfied simply to avoid imposing this draconian fate on prisoners who have acted in good faith. This, of course, would severely undermine and devalue the comity interests at the core of the *Rose* dismissal requirement. *See Rose,* 455 U.S. at 518 (citation omitted). ("The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings").

Finally, consideration of how the government's interpretation of § 2244(d)(1) would work in practice leads to the obvious question of how a court of appeals' disagreement with a district court's finding of exhaustion would impact the standing of a prisoner's petition. There could be cases where, for example, the district court grants relief after finding that a prisoner's claim was exhausted, but the court of appeals, while agreeing with the district court's determination on the merits, vacates the exhaustion ruling after identifying some possibility that the prisoner might yet obtain merits review in state court. In all but the rarest of circumstances, the district court and the court of appeals proceedings will have occupied more than one year. If, as logic would dictate, the court of appeals' determination that the case should be returned to the state court has the effect of retroactively rendering the petition subject to dismissal since the day it was filed in the district court, the prisoner would be instantly and permanently out of time. And if the prisoner is thereafter unsuccessful in securing relief from the state courts, he will, as a result of the federal courts' inability to agree on a close question of exhaustion, be forever barred from obtaining the relief to which those same federal courts found him entitled. The unfairness of such a regime is obvious.

III. SUSPENDING THE RUNNING OF THE LIMITATIONS PERIOD DURING THE PENDENCY OF A PETITION SUBSEQUENTLY DISMISSED WITHOUT PREJUDICE IS CONSISTENT WITH THE PURPOSE OF §2244(D).

In support of its strained and unpersuasive construction of the statutory language, the government argues that suspending §2244(d)'s limitation period during the pendency of an unexhausted federal habeas petition will lead to repetitive, abusive filings by prisoners, without furthering the interests underlying the exhaustion requirement. *See* Pet. Br. 32-36. The government contends, for example, that "[i]f

. . . tolling were permitted for federal habeas petitions, then habeas petitioners would be encouraged to make federal court their first stop" because "there would be no practical incentive. . . for a petitioner to evaluate his or her claims for exhaustion prior to filing in federal court." Pet. Br. 34. The government also asserts that prisoners would file unexhausted federal petitions to "buy additional time prior to filing in state court." *Id.* In short, the government raises the spectre of federal courts being flooded with frivolous petitions.

But as this Court noted in *Slack v. McDaniel,* 120 S.Ct. 1595, 1606 (2000), States can enact legislation that prevent prisoners from repeatedly returning to courts for post-conviction review. Section 2254(b)(2) provides federal courts with a means to dismiss petitions with prejudice, even if they contain claims that have not been properly exhausted in the state courts. And the Federal Rules of Civil Procedure, applicable to habeas proceedings, provide the federal courts with alternative ways to stop vexatious petitioners.

Section § 2254(b)(2) of the AEDPA provides that "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." Section 2254(b)(2) empowers the district court judges to deny petitions containing unexhausted claims on the merits, thereby subjecting any subsequent petition the prisoner may attempt to file, to the extremely rigorous second or successive application requirements contained in § 2244(b).[17] Clearly,

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[17] Section 2244(b) provides, in pertinent part:

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless-

no prisoner with even the most rudimentary understanding of habeas procedure, would view the real possibility of a denial on the merits and its attendant second or successive petition consequences a risk worth taking merely "to buy additional time". Pet. Br. 34.[18]

Furthermore, contrary to the government's suggestion, suspending the running of the limitations period for the time a federal district court requires to determine that a petition contains unexhausted claims is entirely consistent with, and does further, the objectives embodied in the total exhaustion rule. As this Court necessarily concluded in *Rose*, dismissal of mixed petitions is a necessary tool for promoting full exhaustion of all claims. To avoid unwarranted unfairness, however, such dismissals must be accomplished in a manner that "does not unreasonably impair the prisoner's right to relief." *Rose*, 455 U.S. at 522. As discussed *supra* at 31-31,

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(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

[18] Moreover, as this Court has recognized, non-capital prisoners, who file the overwhelming majority of federal habeas petitions, have no incentive to delay the adjudication of their claims. *See, Rose*, 455 U.S. at 520 ("The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims"). In addition, no competent attorney representing a death-sentenced prisoner would risk denial on the merits pursuant to § 2254(b)(2) merely for the sake of suspending the limitations period.

subjecting prisoners who file in good faith to permanent loss of the right to seek habeas relief as a result of dispositional delays entirely beyond their control would clearly constitute an unreasonable impairment of access to habeas review, and would be fundamentally unfair. The more prudent course, especially in light of the discipline imposed by the threat of § 2254(b)(2), is to affirm the ruling of the Second Circuit Court of Appeals below, and suspend the running of the limitations period during the pendency of habeas petitions containing unexhausted claims.

Were this Court to determine that the limitations period is not suspended during the pendency of a federal petition for a writ of habeas corpus, basic fairness would require the establishment of procedures capable of safeguarding the rights of unwary prisoners. At minimum, it would be necessary to promulgate rules requiring federal district courts to expedite consideration of the exhaustion status of the petitions they receive, and to promptly dismiss those petitions that do not satisfy the total exhaustion rule. Additionally, a notification and election procedure would be necessary, whereby the district court would be required to inform a prisoner that his petition contains unexhausted claims, warn the prisoner of his limitations period status, and permit him to choose either to amend the petition to delete unexhausted claims, or to accept dismissal.[19] Proceeding without such

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[19] Several federal courts of appeal have recently adopted an analogous procedure to warn federal prisoners about the consequences of a district court's recharacterization of a post-trial pleading as a motion for relief pursuant to 28 U.S.C. § 2255, and to allow those prisoners to make an informed determination as how to proceed. *See, e.g. United States v. Evans*, 224 F.3d 670, 675 (2000) ("When a prisoner who has yet to file a motion under § 2255 invokes Rule 33 but presents issues substantively within §2255 Par.1, the district judge should alert the movant that his can preclude any later collateral proceedings and ask whether the prisoner wishes to withdraw the claim (or add any other arguments for collateral relief)"); *United States v. Miller*, 197 F.3d 644, 652 (3d Cir. 1999) ("upon

basic procedural safeguards would create a genuine, unacceptable risk of trapping large numbers of prisoners into unwittingly sacrificing their first and only opportunity for federal habeas review. Indeed, as this Court noted, in *Longchar v. Thomas,* 517 U.S. 314, 324 (1996), "Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denied the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty".

CONCLUSION

For the reasons set forth above, the Second Circuit Court of Appeals' ruling should be affirmed.

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receipt of pro se pleadings challenging an inmate's conviction or incarceration—whether styled as a § 2255 motion or not—a district court should issue a notice to the petitioner regarding the effect of his pleadings. This notice should advise the petitioner that he can (1)have his motion ruled upon as filed; (2) if his motion is not styled as a § 2255 motion have his motion recharacterized as a §2255 motion and heard as such, but lose his ability to file successive petitions absent certification by the court of appeals; or (3) withdraw the motion, and file one all-inclusive §2255 petition within the one-year statutory period"); *Adams v. United States,* 155 F.3d 582, 584 (2nd Cir. 1998) (*per curiam)* ("[D]istrict courts should not recharacterize a motion purportedly made under some other rule as a motion made under § 2255 unless (a) the movant, with knowledge of the potential adverse consequences of such recharacterization, agrees to have the motion so recharacterized, or (b) the court finds that, notwithstanding its designation, the motion should be considered as made under § 2255 because of the nature of the relief sought, and offers the movant the opportunity to withdraw the motion rather than have it so recharacterized").

Respectfully submitted,

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IN THE

Supreme Court of the United States

GEORGE DUNCAN,

Petitioner,

v.

SHERMAN WALKER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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REPLY BRIEF OF PETITIONER

The sole issue in this case is whether a federal habeas corpus petition is an "application for State post-conviction or other collateral review" within the meaning of the tolling provision of AEDPA's statute of limitations, 28 U.S.C. § 2244(d)(2). Respondent's brief ("Resp. Br.") relies heavily on the arguments set forth by the Second Circuit below and by the Tenth Circuit in *Petrick v. Martin*, 263 F.3d 624 (10th Cir. 2001), both of which strained to read the applicable text and statutory purposes in light of "fairness" and "equity" concerns not presented by this case.

Neither the textual nor policy arguments of those courts or of respondent can withstand scrutiny. Interpreting the one-year statute of limitations as being tolled only during the pendency of state collateral proceedings is consistent with the text of the provision and the purposes of AEDPA, as well as with this Court's habeas corpus jurisprudence.

I. The Statutory Text Of The Tolling Provision Does Not Encompass Prior Federal Habeas Petitions

Respondent's textual argument in support of the Second Circuit's reading of section 2244(d)(2) rests almost entirely on the contention that the word "or" creates a complete disjunctive break "down the center" of the phrase "application for State post-conviction or other collateral review." Resp. Br. at 12. He thus strains to make the words on either side of the disjunctive "or" independent and symmetrical, arguing that "State post-conviction" and "other collateral" are the terms intended to be contrasted by the disjunctive "or". Resp. Br. at 13. Having arbitrarily eliminated "review" from the contrasting phrase in the interest

of forced symmetry, respondent notes that because "post-conviction" and "collateral" are used interchangeably by Congress and the courts, "the only method by which to supply independent meaning to the phrases occupying opposite sides of" the disjunctive "or" is by use of distinguishing adjectives, "State" and "other". Resp. Br. at 13. Thus, according to respondent, "other" must mean something distinct from "State". Resp. Br. at 13.

Respondent's contention is strained and misplaced. The phrase "State post-conviction or other collateral review" contains only one noun, and thus is the unitary prepositional object of the preceding phrase "a properly filed application for". It simply is incorrect that "or" creates a complete disjunction down the middle of the unitary prepositional object. In fact, the words on the two sides of "or" cannot (and do not) line up against one another. Respondent's suggestion that both sides of the disjunctive "or" are entirely independent of one another would require insertion of the noun "review" on each side of the word "or" – *i.e.*, "State post-conviction [review]" or "other collateral review" – and thus would create a compound, rather than unitary, prepositional object. This, however, is not what Congress did.

Contrary to respondent's assertion, the phrase "State post-conviction or other collateral review" must be read as a whole, and as it is written – without the noun "review" appearing at a second place. Accordingly, under the more natural reading, the terms contrasted and given distinct meaning by the disjunctive "or" are not "State" and "other", but rather "post-conviction" and "other collateral", such that the word "State" stands outside of the disjunctive phrase, modifying the only noun "review".

This reading is supported by the fact that "State" and "other" are not cognate or congruent terms which naturally lend themselves to contrast or juxtaposition. Indeed, if respondent's reading is correct, then there is no reason why "State" and "other" have any place or meaning whatsoever in the provision.

By contrast, under petitioner's interpretation of the tolling provision, both "State" and "other" are meaningful. "State" specifies the kind of review proceedings which trigger the toll, and "other" makes clear that "collateral review" is a catch-all that refers to proceedings apart from those falling within the category of "post-conviction" review proceedings. *See* Brief of Petitioner ("Pet. Br.") at 20-23; *see also* Amicus Brief of Criminal Justice Legal Foundation ("CJLF Br.") at 9-10. To so casually read out the significance of a word such as "State", as respondent would have this Court do, *see* Resp. Br. at 12 ("The precise role played by the word 'State' is less clear."), is entirely unsupported as a matter of statutory construction. *See* Pet. Br. at 20.

If "State" means "State" and "other" means "federal" (or "State and federal"), then Congress used a rather oblique method to signify this in an area of the law where reference to sovereign entities is otherwise specified with great clarity. *See* Pet. Br. at 29-32; *see also Lindh v. Murphy*, 521 U.S. 320, 331-32 (1997) (rejecting ambiguous, indirect reading of AEDPA in favor of straightforward interpretation on grounds that Congress is not "so delphic"). In any event, Congress certainly did not set forth such a meaning with the level of clarity found in other parts of the habeas statute, where it clearly stated "Federal or State" proceedings (or "State or Federal" proceedings) when it so intended. *See* Pet. Br. at 27-29 (citing 28 U.S.C. §§ 2254(i), 2261(e) & 2264(a)(3)).

The tolling provision applicable to AEDPA's statute of limitations in capital cases, 28 U.S.C. § 2263(b), underscores the State's reading of section 2244(d)(2). Section 2263(b)(2) provides for tolling of the statute of limitations applicable in capital cases during the period beginning with the filing of a petition "for post-conviction review or other collateral relief . . . until final State court disposition of such petition." *Id.* Congress's phraseology in section 2263(b)(2) confirms that "other collateral relief" has meaning apart from "post-conviction review", and that limited tolling triggered only by State court proceedings falls within the policy of AEDPA. *See also* CJLF Br. at 7-8, 10-11 (noting that AEDPA's statute of limitations applicable to petitions by non-capital *federal* prisoners includes no tolling provision at all); *id.* at 12-14 (comparing legislative history of terminology of section 2244(d)(2) and section 2263(b)(2)). Respondent does not adequately explain why a different interpretation should lie, either as a matter of statutory construction or policy, with respect to non-capital cases involving state prisoners.

Recognizing the spurious nature of the Second Circuit's construction of the statutory text of the tolling provision, *see* Resp. Br. at 16 ("Even if this Court finds that the canons of statutory construction do not support the Second Circuit Court of Appeals' ruling. . . ."), respondent instead seeks to support the holding below by invoking a bizarre reading of AEDPA's statute of limitations as a whole. Respondent contends (Resp. Br. at 16-19) that AEDPA's statute of limitations requires only that a habeas petitioner file *any* federal habeas petition within the one-year limitations period. Regardless whether that timely federal petition is ultimately dismissed, according to respondent, all subsequent federal habeas petitions by that petitioner would also be timely because he had filed an earlier, now-dismissed federal petition within the one-year limitations period.

This contention flies in the face of the statute. Section 2244(d) provides that the one-year limitations period applies "to an application for a writ of habeas corpus", not to an *applicant* for habeas relief. The particular federal habeas application at issue, therefore, must be filed within the one-year limitations period. It does not suffice that the same petitioner timely filed a *previous*, dismissed application for habeas relief from the judgment, even if that dismissal was without prejudice.

It is established law that an initial habeas petition, dismissed without prejudice, is treated "as though it had not been filed." *Slack v. McDaniel*, 529 U.S. 473, 487-88 (2000). Indeed, under "the Rules of Civil Procedure applicable as a general matter to habeas cases," *id.* at 489, it has long been settled that a dismissal without prejudice leaves the situation as if the dismissed petition never had been brought. *See Hull v. Kyler*, 190 F.3d 88, 103 (3d Cir. 1999); *Bomer v. Ribicoff*, 304 F.2d 427, 428 (6th Cir. 1962); *see also* 9 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 2373 at 398 & n.8, § 2367 at 321 n.8 (1995).

For that reason, the filing of an initial petition, ultimately dismissed, has no effect on an applicable statute of limitations. *See Elmore v. Henderson*, 227 F.3d 1009, 1011 (7th Cir. 2000) (Posner, C.J.) (collecting cases); *see also Semtek Int'l Inc. v. Lockheed Martin Corp.*, __ U.S. __, 69 U.S.L.W. 4147, 2001 U.S. LEXIS 1951, at *16-17 (Feb. 27, 2001) ("Black's Law Dictionary (7th ed. 1999) defines . . . 'dismissal without prejudice' as '[a] dismissal that does not bar the plaintiff from refiling the lawsuit within the applicable limitations period.' "). This is especially true in Walker's case, where the habeas application at issue raised claims entirely different from his previously dismissed federal habeas petition.

II. Petitioner's Reading Of The Tolling Provision Furthers The Purposes Underlying AEDPA And This Court's Habeas Corpus Jurisprudence

The State's reading of the tolling provision is consistent with the statutory purposes underlying AEDPA and the statute of limitations, as well as this Court's habeas corpus jurisprudence. Congress designed AEDPA to "reduce the abuse of habeas corpus that results from delayed and repetitive filings." CJLF Br. at 15 (internal quotations omitted). By establishing a one-year period of limitations, section 2244(d) effectuates this intent of reducing delay. The statute of limitations concomitantly promotes AEDPA's purpose of fostering comity for state court proceedings by encouraging the timely filing of a single federal habeas petition that contains only constitutional claims upon which the state courts already have passed. *See* Pet. Br. at 32-36.

The State's reading of the tolling provision is entirely consistent with the rationale underlying *Rose v. Lundy*, 455 U.S. 509 (1982). In *Rose*, this Court provided "a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." 455 U.S. at 520; *see also Duckworth v. Serrano*, 454 U.S. 1, 5 (1981) (per curiam) (rejecting an exception to the exhaustion requirement even for "clear violations" of constitutional rights, because it "would invite habeas petitioners to make a practice of first seeking relief on those grounds in federal court").

AEDPA furthers this policy by not permitting a petitioner to avail himself of statutory tolling when he does not first exhaust his claims in state court before filing an application for federal habeas relief. In other words,

"[t]he Congressional policy is clear. Exhaust state remedies first, then and only then go to federal court. The policy is advanced by denying tolling for a prior, dismissed federal petition." CJLF Br. at 19.

In an effort to evade this clear dictate, respondent argues that it is unfair "to place the onus on the prisoner to make sure that his petition contains only exhausted claims," because whether a claim genuinely is exhausted frequently presents a difficult question that is debatable among "knowledgeable attorneys and experienced judges." Resp. Br. at 22. Although the exhaustion status of a claim sometimes is unclear, AEDPA simply requires a petitioner to err on the side of caution by presenting such a claim to the state courts first to ensure that state courts have a full opportunity to rule on the issue in question. *See Rose*, 455 U.S. at 518-19 ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error.").

AEDPA discourages petitioners from running to federal court unless and until they have resolved, through resort to the state courts, the doubtful exhaustion status of any particular claim. This regime not only promotes comity and respect for state court judgments, but it benefits the petitioner, because all the while that he is pursuing state court remedies, the statute of limitations for the filing of a federal habeas application is tolled. *See* 28 U.S.C. § 2244(d)(2).

Indeed, "the path to this straightforward approach was cleared by this Court's generous interpretation" of section 2244(d)(2) earlier this Term in *Artuz v. Bennett*, 121 S. Ct. 361 (2000). CJLF Br. at 16. In *Bennett*, the Court held that

the filing of an application for "post-conviction or other collateral review" in state court that contains claims that may be procedurally barred under state law does not render the application itself "improperly filed" within the meaning of section 2244(d)(2). 121 S. Ct. at 363-65. *Bennett* thus encourages petitioners with claims of questionable exhaustion status to bring them in state court first rather than risk running to federal court only to learn later that such claims are unexhausted and therefore ripe for dismissal, in accordance with *Rose*'s command to dismiss petitions containing both exhausted and unexhausted claims. *See Rose*, 455 U.S. at 522.

Stated differently, the application of section 2244(d)(2) does not, as respondent asserts, " 'unreasonably impair the prisoner's right to relief.' " Resp. Br. at 23, 26 (quoting *Rose*, 455 U.S. at 522). Excluding early "mixed" federal petitions from the tolling provided by section 2244(d)(2) only steers prisoners away from federal court and toward state court until such time as the petitioner can include all of his claims, now exhausted, in one single habeas petition that the federal court may consider on the merits. That policy is entirely consistent with and in furtherance of AEDPA, *Rose*, and this Court's habeas jurisprudence.

III. "Fairness" and "Equity" Concerns In Hypothetical Cases Do Not Justify Departure From Plain Construction of the Statute

Respondent nevertheless urges this Court to look beyond the statutory text and to construe the tolling provision expansively in light of the harsh results a contrary reading could potentially inflict in some hypothetical cases on unwary habeas petitioners. Resp. Br. at 23. He contends that

if the limitations clock continues to run during the pendency of a timely-filed federal habeas petition that later is dismissed on exhaustion grounds, the statute of limitations will be in the hands of "overworked judges with no mandate to process petitions uniformly or expeditiously" (Resp. Br. at 21) and that the limitations period may prevent some meritorious claims from ever being heard on federal habeas review because of technical procedural errors by *pro se* petitioners (Resp. Br. at 23).

Respondent's contention is misplaced. There is no basis at this juncture to presume that, were the Court to announce a clear holding in this case that the one-year limitations period continues to run during the pendency of federal habeas proceedings, prospective habeas petitioners or their counsel would not be able to conform their litigation strategy so as to file timely federal habeas petitions in a manner that allows for meritorious claims to be heard on the merits. "Just as *pro se* petitioners have managed to use the federal habeas machinery" and have learned "to master th[e] straightforward exhaustion requirement" set down in *Rose*, 455 U.S. at 520, so, too, should they be able to grasp the import and the potentially dire consequences (in light of AEDPA's statute of limitations) of filing a habeas petition that contains unexhausted claims, and thus is subject to dismissal following the passage of at least some time.

In fact, many of the alleged problems forecasted by respondent may well not come to fruition following this Court's articulation of its holding in this case, and any consequent adjustment of federal district court judges and habeas petitioners and counsel. Judges will have clear guidance to review federal habeas petitions expeditiously to

determine threshold issues of exhaustion and dismissal,[1] and habeas petitioners (and their counsel) will have added incentive to err on the side of exhaustion of their claims in state court proceedings to ensure federal habeas review on the merits and to invoke the statutory toll for the pendency of state proceedings. It simply is premature for the Court at this time to anticipate the practical consequences of a clear holding, or to presume dire consequences, and thereby base any interpretation of the statute upon such presumed hypothetical scenarios.

Indeed, the facts of this case do not provide a basis to consider the concerns raised by respondent. Walker's initial federal habeas petition was dismissed (without prejudice) promptly by the district court – within three months from the date of filing. Furthermore, the petition was dismissed not because it was a mixed petition containing unexhausted claims for which he necessarily would have had to return to state court, but rather due to a pleading deficiency: the petition did not adequately set forth which claims had been exhausted.

Although Walker had approximately ten months to correct the pleading deficiency and file a new federal petition, or else to return to state court to exhaust any unexhausted claims and thereby invoke the statutory toll, Walker instead

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1. The habeas statute requires district courts to consider applications for writs "forthwith" and sets short time limits on the process (*i.e.*, a return within three days, unless additional time is allowed, not to exceed twenty days; hearing set not more than five days after return unless additional time allowed for good cause; court to "summarily" hear and determine the facts). *See* 28 U.S.C. § 2243; *see also Lonchar v. Thomas*, 517 U.S. 314, 328 (1996) (discussing habeas Rule 4, which mandates that district court judges address petitions "promptly").

waited nearly eleven months before taking *any* further action. At that point, one month *after* the one-year period had run, Walker filed the habeas petition at issue before this Court, which contained entirely different claims from those presented in his initial federal application. Because those new claims had been raised on initial appeal of the state court conviction, there was no apparent reason why these claims could not have been timely presented within the one-year grace period for federal habeas review.

Under these circumstances, any "harshness" of result arising out of Walker's forfeiture of federal habeas review on the merits is attributable to his own lack of diligence. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1990) ("The equities do not weigh in favor of modifying statutory requirements when the procedural default is caused by petitioners' 'failure to take the minimal step necessary' to preserve their claims.") (citation omitted); *Coleman v. Johnson*, 184 F.3d 398, 403 (5th Cir. 1999) (dismissal sustained because "Coleman does not explain the six-month delay between being notified about his state application and filing his federal petition"), *cert. denied*, 529 U.S. 1057 (2000); *United States v. Barrett*, 178 F.3d 34, 53 (1st Cir. 1999) ("where a prisoner had an opportunity to present his claim properly in his first § 2255 petition, but failed to do so, any 'ineffectiveness' of his current § 2255 petition is due to him"), *cert. denied*, 528 U.S. 1176 (2000).

The State recognizes, nevertheless, that it is possible in future cases that there may be timely-filed "mixed" federal habeas petitions containing potentially meritorious claims, but which could be subject to *Rose* dismissal after the one-year limitations period had expired during their pendency. In such cases, the narrow scope of the tolling provision

proposed by the State in this case could result in final denial of substantive federal habeas review of the potentially meritorious claims, notwithstanding their timely presentation (albeit in a "mixed" petition).

Statutes of limitation (like procedural default rules and exhaustion requirements), however, by their very nature impose a bar to the interposition of claims that may have merit, some of which may be barred for reasons outside of the claimant's control. In *Rose*, a plurality of the Court expressly recognized the possibility that in certain instances, no federal court might, for technical procedural reasons, ever reach the merits of certain habeas claims that a petitioner sought to bring in federal court. *See Rose*, 455 U.S. at 520 (noting that petitioner "would risk forfeiting [future] consideration of his unexhausted claims in federal court" if he failed to include them in his initial petition).[2]

In an effort fundamentally to reshape the landscape of federal habeas corpus law, AEDPA raised the bar to merits review of federal habeas petitions one notch higher. To the extent that AEDPA's statute of limitations, coupled with its failure to toll the limitations period for federal habeas applications, operates to bar certain petitioners from ever obtaining substantive habeas review, that is the policy

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2. *Cf. McNeil v. United States*, 508 U.S. 106, 113 (1993) (strictly applying the exhaustion requirement of Federal Tort Claims even against a pro se inmate, noting that "we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel" and that "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law") (quotation omitted).

determination Congress has made. *See Artuz v. Bennett*, 121 S. Ct. at 365 ("[I]t is not the province of this Court to rewrite the [AEDPA] statute. . . . We hold as we do because respondent's view seems to us the only permissible interpretation of the text – which may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted.").

Accordingly, the concerns raised by respondent as to hypothetical cases involving potentially meritorious claims do not justify departure from the proper *construction* dictated by the plain meaning of the language and statutory structure. *See United States v. Locke*, 471 U.S. 84, 93 (1985) ("with respect to filing deadlines a literal reading of Congress' words is generally the only proper reading of those words"); *cf. Miller v. French*, 530 U.S. 327, 338 (2000) ("the canon of constitutional doubt permits us to avoid [constitutional] questions only where the saving construction is not 'plainly contrary to the intent of Congress' ") (citation omitted).

Whether federal district courts have any discretion to depart from strict *application* of AEDPA's statute of limitations (properly construed) in such cases, and the scope or legal basis of any such discretion, is a distinct issue not before the Court in this case. The only issue before the Court here is how the statute of limitations should properly be interpreted, not whether there will be individual cases in the future where district courts may let equitable considerations guide their application of the statute of limitations.

Determination of the latter issue concerning equitable application of the limitations period in hypothetical cases will require percolation among the lower federal courts, in

the context of numerous factual and procedural scenarios, and in the light of practical experience with the consequences of the Court's holding in this case. *Cf. Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring) ("Resolving the issue is neither necessary nor advisable in this case. The question is a sensitive and, to say the least, troubling one. It implicates not just the life of a single individual, but also the State's powerful and legitimate interest in punishing the guilty, and the nature of state-federal relations."); *see also* Resp. Br. at 27-28 & n.19 (noting that adoption of procedural rules and notice provisions by lower federal courts could help "safeguard[] the rights of unwary petitioners" and help protect them from "unwittingly sacrificing their first and only opportunity for federal habeas review").[3]

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3. As respondent notes (Resp. Br. at 18-19, 27), the federal habeas statute permits federal district courts to reach out and provide substantive federal habeas review of mixed petitions for purposes of denying such petitions on the merits. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). The vast majority of habeas petitions do not present meritorious claims and are ultimately denied on the merits. *See* Victor E. Flango, National Center for State Courts, State Justice Institute, Habeas Corpus in State and Federal Courts at 62-63 (1994) (study of petitions filed in 1990 and 1992 finding a success rate of only 1%); see also Richard H. Fallon et al., Hart and Wechsler's The Federal Courts and The Federal System 1363-1364 (1996) (discussing filing and success rates for habeas petitions since 1950). Thus, section 2254(b)(2) enables federal district courts to reach the merits of timely-filed mixed petitions that are held beyond the one-year limitations period, in circumstances in which their dismissal would forever bar a petitioner from receiving substantive federal habeas corpus review.

It is sufficient for the present case that the petitioner's situation does not favor any departure from a strict application of the statute of limitations. *Cf. Wainwright v. Sykes*, 433 U.S. 72, 91 (1977) ("Whatever precise content may be given those terms [i.e., "cause" and "prejudice"] by later cases, we feel confident in holding without further elaboration that they do not exist here."). In view of Walker's clear lack of diligence and the absence of extraordinary circumstances, this is not a case in which the Court should reach beyond the facts of this case and address the hypothetical issue raised by respondent. *See Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."); *see also United States v. Gonzalez*, 520 U.S. 1, 11 (1997) (noting that this Court is "hesitant to reach beyond the facts of this case to decide a question that is not squarely presented for our review").

CONCLUSION

The decision of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a prior federal habeas corpus petition is an "application for State post-conviction or other collateral review" within the meaning of 28 U. S. C. § 2244(d)(2), which provides that the one-year statute of limitations for federal habeas corpus petitions set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is tolled during the pendency of such an application.

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IN THE

Supreme Court of the United States

GEORGE DUNCAN,

Petitioner,

vs.

SHERMAN WALKER,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the proper interpretation of Congress's landmark reform of habeas corpus law in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This law, if

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

properly implemented, will greatly reduce unnecessary delay in the enforcement of the criminal law. These changes would advance the rights of victims and society which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On June 16, 1992, Sherman Walker was convicted of robbery and sentenced, having pleaded guilty, in Queens County, New York. This is the conviction at issue in the present habeas petition. He also has two other robbery convictions in February of the same year. See Pet. for Cert. 3, 12a.

The June 16 judgment was affirmed by the state intermediate appellate court. It rejected as factually unsubstantiated a claim under *People* v. *Rosario*, 9 N. Y. 2d 286, 173 N. E. 2d 881 (1961), relating to disclosure of statements of prosecution witnesses. See *People* v. *Walker*, 628 N. Y. S. 2d 950, 951 (N. Y. App. Div. 1995). He further claimed that the police failed to contact an attorney who had represented him in an unrelated matter before placing him in a lineup. The appellate court rejected this claim on the grounds that the police have no obligations to make such a contact, given that defendant was represented at the lineup by another attorney appointed for him in this matter. *Ibid.*

The state high court dismissed Walker's appeal on January 5, 1996. *People* v. *Walker*, 87 N. Y. 2d 926, 641 N. Y. S. 2d 608, 664 N. E. 2d 519 (1996). The case became final under state law ten days later. See Pet. for Cert. 15a. The time to petition for certiorari expired, at the latest, Monday, April 15, 1996. Meanwhile, on March 18, 1996, the intermediate appellate court denied on the merits a coram nobis application based on alleged ineffective assistance of appellate counsel. *People* v. *Walker*, 639 N. Y. S. 2d 932 (1996). "According to appellant [Walker], he also filed a separate motion in February 1996 to vacate his conviction in state court, which denied the motion in April 1996." App. to Pet. for Cert. 2a. The President

signed the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, on April 24, 1996.[2]

On April 10, 1996, Walker filed in United States District Court a combined civil rights complaint against his attorneys under 42 U. S. C. § 1983 and habeas petition challenging his conviction in the June 16 case, as well as the two other cases. See App. to Pet. for Cert. 2a, 17a-18a. On July 9, 1996, the District Court dismissed the civil rights suit as frivolous, as "court-appointed lawyers do not act under color of state law within the meaning of § 1983." *Id.*, at 19a (citing *Polk County* v. *Dodson*, 454 U. S. 312 (1981)). The District Court also dismissed the habeas petition without prejudice because petitioner failed to show exhaustion by detailing the claims litigated in state court. *Id.*, at 20a.

Rather than seeking relief from this dismissal, Walker waited until May 20, 1997, and then filed the instant petition. *Id.*, at 12a. This petition attacked only the June 16 conviction on the two grounds considered in the original appeal: the *Rosario* claim and the failure to contact previous counsel before the lineup. *Id.*, at 11a. The District Court dismissed the petition as barred by the statute of limitations. *Id.*, at 15a-16a. The District Court further denied a certificate of appealability, finding no "substantial showing of the denial of a constitutional right." *Id.*, at 16a.

The Court of Appeals issued a certificate of appealability on the statute of limitation issues only. *Walker* v. *Artuz*, 208 F. 3d 357, 358 (CA2 2000). The court did not indicate any basis for believing that petitioner's underlying claims were even debatably meritorious, cf. *Slack* v. *McDaniel*, 529 U. S. __, 146 L. Ed. 2d 542, 551, 120 S. Ct. 1595, 1601 (2000), presumably because *Slack* was decided a month later.

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2. As we will discuss in part I, *infra*, the effective date of the statute makes the precise calculation of the finality date immaterial. By any calculation, finality predates the statute.

The Court of Appeals decided that the tolling provision of 28 U. S. C. § 2244(d)(2) included tolling for a prior federal petition. 208 F. 3d, at 360. As applied to this case, the statute would be tolled from the effective date of the AEDPA until dismissal of the first federal petition on July 9, 1996. Hence, the petition filed May 20, 1997, would be timely.

The State petitioned this Court for a writ of certiorari to resolve the split between this decision and the contrary decisions of other circuits, see *infra*, at 8, which was granted on November 13, 2000.

SUMMARY OF ARGUMENT

Unless tolling applies, the last day to file a petition for a writ of habeas corpus in this case was April 24, 1997. Finality in this case precedes the enactment of the AEDPA. Under the rule of *Sohn* v. *Waterson*, pre-AEDPA petitioners had one year from enactment to file.

The language and history of the statute indicate that only state collateral petitions toll it. The argument of the Court of Appeals that "other collateral review" in 28 U. S. C. § 2244(d)(2) *must* refer to federal petitions cannot be reconciled with the use of nearly identical language to refer to state petitions in § 2263(b)(2). "Other collateral" was apparently added because, in some states, "post-conviction" refers to a specific procedure rather than a class of procedures. The complete absence of a tolling provision in the otherwise equivalent statute of limitation for federal prisoners further reinforces the conclusion that tolling is only for state petitions.

Legislative history confirms this interpretation. There is no indication that changes in wording during the evolution of the bill were intended to include tolling for federal petitions. The simultaneous appearance of "other collateral" in §§ 2244(d)(2) and 2263(b)(2) strongly implies it has the same meaning in both.

The purpose of the AEDPA is best served by not allowing tolling for prior federal petitions. To minimize delay and repetitive filings, petitioners who have claims that may or may not be exhausted should be encouraged to file them in state court first. The generous interpretation of tolling for state court filings in *Artuz* v. *Bennett*, coupled with denying tolling for unexhausted federal petitions, will encourage the proper procedure and reduce shuttling between state and federal courts.

Equitable tolling is available to mitigate the harshness of applying the above rule in circuits where the pre-*Bennett* precedents were contrary to the eventual outcome of that case.

ARGUMENT

I. Unless tolling applies, the last day to file a petition for writ of habeas corpus was April 24, 1997.

Before discussing the question of tolling, it is necessary to identify precisely the deadline in the absence of tolling. The statute provides:

> "A 1-year period of limitation shall apply to an application for a writ of habeas corpus .... The limitation period shall run from the latest of—¶(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; ...." 28 U. S. C. § 2244(d)(1).

This language specifies both the date on which the "clock" starts and what the would-be petitioner must do to meet the deadline.

Prior to enactment of the AEDPA, finality on direct review was important for retroactivity. See *Griffith* v. *Kentucky*, 479 U. S. 314, 321, n. 6 (1987). *Caspari* v. *Bohlen*, 510 U. S. 383, 390 (1994) defined finality for this purpose as "when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari

has elapsed or a timely filed petition has been finally denied." The similarity of the statutory language to the *Griffith/Bohlen* rule implies that Congress had this date in mind. In any event, there is considerable practical value in having a single, well-defined date of "finality" for both retroactivity and § 2244(d)(1) and no compelling argument for a different method of calculation. A petition for writ of certiorari to this Court is not one of the state remedies that must be exhausted, see *County Court of Ulster Cty.* v. *Allen*, 442 U. S. 140, 149-150, n. 7 (1979), but the word "State" is conspicuously absent from § 2244(d)(1)(A). Cf. 28 U. S. C. §§ 2244(d)(2) (tolling), 2254(b)(1)(A) (exhaustion). The Court of Appeals applied this rule to Walker's direct appeal and calculated the finality date as April 14, 1996. *Walker* v. *Artuz*, 208 F. 3d 357, 358 (CA2 2000).[3]

This finality date predates the enactment of the statute of limitations. The general rule of construction for this situation was established in *Sohn* v. *Waterson*, 17 Wall. (84 U. S.) 596, 600 (1873). When the triggering event occurs prior to enactment of the statute, the clock starts upon enactment, and the moving party has the full statutory time from that date. As there is no contrary indication in the statutory language, the *Sohn* rule sets April 24, 1997, as the deadline for cases which became final before April 24, 1996. The Court of Appeals applied an equivalent rule in this case. See *Walker*, *supra*, 208 F. 3d, at 359.

The final preliminary point is precisely what the petitioner needs to do by the deadline to meet it. The answer is plain on the face of the statute. The limitation expressly applies to the "application for a writ of habeas corpus," which is synonymous with a "petition for a writ of habeas corpus." See Rule 2(a) of

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3. This calculation includes a ten-day period after the state high court decision, but see Supreme Court Rule 13.3, and overlooks the fact that April 14, 1996, was a Sunday. Cf. Supreme Court Rule 30.1. For the reasons discussed in the next paragraph, these issues are not material to the present case.

the Rules Governing Section 2254 Cases in the United States District Courts. The petition must be filed by the due date. This is consistent with Federal Rule of Civil Procedure 3, which provides, "A civil action is commenced by filing a complaint with the court." Prefiling actions, such as requesting counsel, do not constitute commencement. See *Baldwin County Welcome Center* v. *Brown*, 466 U. S. 147, 148, 150-151 (1984) (*per curiam*) (request for counsel and copy of "right to sue" letter did not constitute commencement of action for statute of limitation purposes); see also *West* v. *Conrail*, 481 U. S. 35, 38-39 (1987) (filing complaint is commencement in federal practice).[4]

Taken together, these rules require that Walker file his petition for writ of habeas corpus by April 24, 1997, unless tolling applies to extend that date. We now turn to the tolling question.

II. The language and history of the statute indicate that only state petitions toll the limitations period.

A. Language.

The Antiterrorism and Effective Death Penalty Act, 110 Stat. 1214 (1996) added three statutes of limitation for collateral review of convictions. A one-year limitation applies to state prisoners in cases not subject to Chapter 154. See 28 U. S. C. § 2244(d)(1). A 180-day limitation applies to Chapter 154 cases. See 28 U. S. C. § 2263(a). A one-year limitation applies to federal prisoners. See 28 U. S. C. § 2255, sixth

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4. The Ninth Circuit's holding in *Calderon* v. *United States District Court (Kelly)*, 163 F. 3d 530, 540 (CA9 1998) (en banc), that a case becomes "pending" upon the filing of a request for counsel for the purpose of applying the AEDPA, has not been well received in other circuits. See *Williams* v. *Coyle*, 167 F. 3d 1036, 1039 (CA6 1999); *Gosier* v. *Welborn*, 175 F. 3d 504, 506 (CA7 1999); *Moore* v. *Gibson*, 195 F. 3d 1152, 1162-1163 (CA10 1999).

paragraph. The state prisoner limitations have tolling provisions, but the federal prisoner limitation does not:

> "(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U. S. C. § 2244(d)(2).

> "(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; . . . ." 28 U. S. C. § 2263(b)(2).

In the present case, the Court of Appeals for the Second Circuit interpreted § 2244(d)(2) so that " 'State' modifies only the word 'post-conviction,' " *Walker* v. *Artuz*, 208 F. 3d 357, 359 (CA2 2000), "and the phrase 'other collateral review' . . . means federal habeas petitions." *Id.*, at 360. This limitation of the word "State" is contrary to the conclusions of the other circuits. Three circuits have rejected this interpretation on the very point at issue here. See *Grooms* v. *Johnson*, 208 F. 3d 488, 489 (CA5 1999); *Jones* v. *Morton*, 195 F. 3d 153, 159 (CA3 1999); *Jiminez* v. *Rice*, 222 F. 3d 1210, 1213 (CA9 2000). Three others have rejected it in the context of tolling for certiorari petitions. *Coates* v. *Byrd*, 211 F. 3d 1225, 1227 (CA11 2000) (tolling applies "only so long as the case is in the state courts"); *Rhine* v. *Boone*, 182 F. 3d 1153, 1156 (CA10 1999); *Isham* v. *Randle*, 226 F. 3d 691, 695 (CA6 2000) ("2244(d)(2) is drafted such that 'State' modifies 'postconviction or other collateral relief' ").

The notion that Congress used the word "other" when it meant "Federal" is odd, to say the least. Congress knows how to say "State or Federal" when that is what it means. See *Jiminez*, *supra*, 222 F. 3d, at 1213 (citing 28 U. S. C. §§ 2254(i), 2261(e), 2264(a)(3)).

The mainstay of the Court of Appeals' interpretation is its belief that "State post-conviction review" must necessarily

sweep in all forms of state judicial review of criminal judgments other than direct appeal. See *Walker*, *supra*, 208 F. 3d, at 360. From this premise, it concludes "the phrase 'other collateral review' would be meaningless if it did not refer to federal habeas petitions." *Ibid.*

While the premise might be reasonable looking at § 2244(d)(2) in isolation, it cannot be reconciled with § 2263(b)(2). That subsection also tolls for "*post-conviction* review or *other* collateral relief," and the tolling period ends with "the final *State court* disposition of such petition." 28 U. S. C. § 2263(b)(2) (emphasis added). Beyond question, this subdivision refers only to state judicial remedies. "State court disposition" of a clemency petition or a federal habeas petition would make no sense. Beyond question, Congress thought that the term "post-conviction review" might be interpreted as something less than fully inclusive of all state-court collateral reviews and thought that the term "other collateral" was necessary to preclude a narrower application of the tolling provision. If Congress believed this for § 2263(b)(2), there is no logical reason to doubt it also believed it for § 2244(d)(2). See *infra*, at 14 (simultaneous appearance of both provisions in legislative history).

The Court of Appeals is correct that the term "post-conviction review" *conventionally* refers to all forms of judicial attacks on criminal judgments after finality. See *Walker*, *supra*, 208 F. 3d, at 360. However, language changes with time and varies by place, and today the term sometimes, in some places, refers to a specific procedure rather than a broad category of procedures.

Florida is a case in point. In the wake of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), the Florida courts adopted by rule a new collateral review procedure modeled on 28 U. S. C. § 2255. See *Gideon* v. *Wainwright*, 153 So. 2d 299, 300 (Fla. 1963) (on remand). The new procedure, which is now Florida Rule of Criminal Procedure 3.850, has come to be called a "motion for post-conviction relief." The contemporary usage

of this term is illustrated by this passage from *Knight* v. *State*, 394 So. 2d 997, 998-999 (Fla. 1981) (*per curiam*) (emphasis added):

> "We have for consideration a *petition for writ of habeas corpus* by Thomas Knight whose conviction and sentence of death were affirmed by this Court in *Knight* v. *State*, 338 So.2d 201 (Fla. 1976). We originally transferred this petition to the Eleventh Judicial Circuit and directed that it be *treated as a motion for post-conviction relief*. The trial judge in considering the petition properly determined that since petitioner's claim for relief is predicated on the assertion of ineffective assistance of appellate counsel, such relief can only be granted by habeas corpus in the appellate court unless it was caused by an act or omission of the trial court. The ineffective assistance of counsel allegations stem from acts or omissions before this Court, and therefore we have jurisdiction and will consider the petition for habeas corpus on its merits."

In Florida, then, "post-conviction relief" refers specifically to Rule 3.850, and habeas corpus is something else. The drafter of § 2244(d)(2) could legitimately have been concerned that if the tolling provision referred only to "post-conviction relief" it might be misinterpreted to not toll for a subsequent habeas petition such as Knight's. Language included to head off an anticipated misinterpretation may be redundant, but the canon of construction against superfluity ought not preclude such an interpretation. In drafting, as in engineering, redundancy can be a necessary safety measure, providing vital backup protection in the event that the primary structure fails.

Another problem with the Court of Appeals' interpretation can be seen by comparing the provisions for state and federal prisoners. The language added in the new sixth paragraph of 28 U. S. C. § 2255 is substantially the same as § 2244(d)(1), but the tolling language of § 2244(d)(2) is omitted entirely. As interpreted by the Court of Appeals, the state prisoner provision tolls for any previous federal petition dismissed for any reason,

not just for nonexhaustion. Is there any logical reason Congress would provide such tolling for state and not federal prisoners?

To illustrate, suppose two hypothetical prisoners, state and federal, file § 2254 and § 2255 petitions, respectively, only to see them denied on the merits a year later. Both then promptly file second petitions, which must face the formidable barriers to such petitions. Assuming they can surmount these barriers, if the Second Circuit is correct then the federal prisoner would be barred by the statute of limitations while the state prisoner would not. That makes no sense. Congress has pointed in the opposite direction by placing a lower hurdle for successive petitions by federal prisoners than for state prisoners. See 6 W. LaFave, J. Israel, & N. King, Criminal Procedure § 28.9(b), p. 136 (2d ed. 1999). A more generous remedy for federal prisoners is consistent with the role of § 2255 as the primary remedy for federal prisoners' claims outside the record, while § 2254 is a "secondary and limited," see *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983), backup to be invoked only when state remedies fail. This policy would be contradicted by a more strict statute of limitations for federal prisoners than for state prisoners.

A more sensible interpretation is that Congress omitted the tolling provision from § 2255 altogether because its subject matter is completely inapplicable to federal prisoners. That is, § 2244(d)(2) tolls for the sole purpose of allowing state prisoners to exhaust *state* remedies. Federal prisoners do not have that requirement and hence do not need the tolling.

The language of the AEDPA as a whole indicates quite strongly that the tolling provision is only for state judicial remedies which follow affirmance on direct appeal. The Court could very well stop at this point. See *King* v. *St. Vincent's Hospital*, 502 U. S. 215, 222, n. 14 (1991). However, if resort to legislative history is thought necessary, further confirmation lies there.

B. History.

Legislative proposals for a statute of limitations have been considered for a number of years, see *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986), but the movement took firm shape with the publication of the Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (1989), reprinted in 135 Cong. Rec. 24,694-24,698 (1989). This report is commonly known as the Powell Committee Report, see, *e.g.*, *Lonchar* v. *Thomas*, 517 U. S. 314, 328 (1996), because retired Justice Powell chaired the committee.

Under the committee proposal, which Senator Thurmond introduced as S. 1760, the clock started with the appointment of post-conviction counsel, see 135 Cong. Rec., at 24,693-24,694 (proposed § 2258(a)), which followed affirmance on direct review in state court. See *id.*, at 24,693, col. 2 (proposed § 2256(b)). Without a statute of limitation, states had been forced to the drastic step of setting execution dates for death row inmates who had not completed review of their sentences, as this was the only way to force them to the next stage of proceedings. See *id.*, at 24,697, col. 3. The limitation period was tolled for the certiorari petition on direct review but not state collateral review. *Id.*, at 24,698, col. 1. It was also tolled for state post-conviction review. *Ibid.* Tolling for a prior federal petition is not mentioned, and apparently no one ever thought that such a tolling rule would apply.

On February 8, 1995, the House passed H. R. 729, the Effective Death Penalty Act of 1995. See 141 Cong. Rec. 4120-4121 (1995). This act carried forward the Powell Committee limitation for capital cases. See Effective Death Penalty Act of 1995, H. Rep. No. 104-23, 104th Cong., 1st Sess., 5, 17 (1995). It also added a statute of limitation for all habeas cases, not just capital cases in qualifying states. This limitation began upon finality of direct review, using the language ultimately adopted, and tolled the limitation "during the pendency of a properly filed application for State review

. . . ." *Id.*, at 2. "[T]he limitation period . . . would be tolled . . . in the course of state collateral review, and would run following the conclusion of state collateral review." *Id.*, at 17. The bill clearly did not contemplate tolling for prior federal petitions.

H. R. 729 modified the Powell Committee proposal by accommodating "unitary review" in states such as California, where the state habeas proceeding overlaps the direct appeal. See *id.*, at 6 (§ 2261(a)); see also *id.*, at 18 (California specifically cited as example of "unitary review"). Starting the clock with appointment of "post-conviction" counsel might have been workable in such states, as the statute would have been tolled during the pendency of "unitary review," see *id.*, at 5-6 (§§ 2258(2), 2261(c)), but it would have been awkward.

In the Senate, there followed "very extended negotiations" between Senator Specter and Senator Hatch. See 141 Cong. Rec. 15,018, col. 3 (1995) (statement of Sen. Specter). They finally agreed on, and jointly sponsored, S. 623, the Habeas Corpus Reform Act of 1995, which was later incorporated into S. 735. See *ibid.* This bill saw the debut of the language ultimately adopted for the Chapter 154 triggering event and for tolling in both chapters. The standard Chapter 153 statute of limitation began at the conclusion of direct review. See Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process, Hearing before the Committee on the Judiciary, United States Senate, S. Hrg. 104-428, 104th Cong., 1st Sess., 118 (1995). The special Chapter 154 limit began with finality in state court but was tolled during pendency of a certiorari petition. See *id.*, at 132-133.

In the committee hearing on S. 623, neither the committee members nor the witnesses indicated that the change in wording of these provisions altered the tolling. On the contrary, California Attorney General Dan Lungren, one of the major proponents of habeas reform, summarized the statute of limitation by stating, "One year for general habeas and 180 days for capital habeas, with tolling periods; that is, periods

where you don't count the time while they are going through State review or State collateral review." *Id.*, at 74.

In *Lindh* v. *Murphy*, 521 U. S. 320, 330 (1997), this Court found significance in the fact that the language making Chapter 154 retroactive appeared after that new chapter and the amendments to Chapter 153 had been combined in the same bill. An even stronger inference can be drawn from the fact that the terms "post-conviction" and "other collateral" appeared simultaneously in the tolling provisions of § 2244 and § 2263.

As H. R. 729 passed the House, both tolling provisions unambiguously applied only to state court proceedings and not to prior federal petitions. As proposed in S. 623 and as ultimately enacted, § 2263(b)(2) also unquestionably applies only to state court proceedings. See *supra*, at 9. The conclusion that "other collateral review" in § 2244(d)(2) refers to federal petitions would require two highly unlikely premises. First, one would have to accept that the drafter of the section intended to extend tolling where none of the prior proposals had extended it. Second, one would have to accept that the mechanism of this extension was the use of a phrase that is essentially identical[5] to a phrase placed simultaneously in another provision of the same bill, where it unquestionably does *not* have that meaning. Each of these premises is unlikely in itself. Together, they border on impossible. The history of the statute thus reinforces the most natural reading of the language, *i.e.*, that "State" modifies both "post-conviction" and "other collateral."

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5. The difference between "application for . . . review" in § 2244(d)(2) and "petition for . . . relief" in § 2263(b)(2) is not significant.

III. The purpose of the AEDPA is best served by not allowing tolling for prior federal petitions.

The purpose of the legislation was stated in the committee report for the House version, H. R. 729. In broad terms, "the bill is designed to reduce the abuse of habeas corpus that results from *delayed* and *repetitive* filings." Effective Death Penalty Act of 1995, H. Rep. No. 104-23, 104th Cong., 1st Sess., 9 (1995) (emphasis added). A construction which encourages prompt filing and discourages repetitive filing therefore furthers the legislative purpose. Referring specifically to the statute of limitations, the report continued, "This reform will curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner." *Ibid.* There is no similar report for the Senate version, but the remarks of the sponsors on the floor indicate the same purpose. See 141 Cong. Rec. 15,019 (1995) (statement of Sen. Specter). An additional purpose was to bolster federalism and give renewed respect to state courts and the primacy of state remedies. See *id.*, at 15,037, col. 2 (statement of Sen. Nickles).

The imprint of these purposes shows clearly in the statutory language. The exhaustion requirement is strengthened by making it nondefaultable, 28 U. S. C. § 2254(b)(3), yet needless returns to state court are reduced by allowing dismissal on the merits of meritless but unexhausted claims. See § 2254(b)(2). The state court proceedings are made more meaningful by the abolition of *de novo* reconsideration, § 2254(d)(1), and by strengthening the requirement to develop the factual basis of the claim in state court. § 2254(e)(2). Repetitive filings are reduced by a strengthened successive petition rule. § 2244(b).

The statute of limitations provision, properly construed, fits snugly into the legislative purposes. It serves to reduce delay, reduce repetition, bolster the importance of state remedies, and yet keep the federal courthouse door open for the petitioner who diligently pursues state remedies and then files his federal

petition promptly upon exhaustion. The smooth flow of the case through each stage once, without backtracking, is encouraged by a generous tolling provision for state petitions and no tolling for an unexhausted federal petition.

Ideally, a convicted defendant makes all of his claims on direct appeal which can be made on the appellate record and all others in the first (and only) state collateral petition. Then he proceeds to federal habeas with fully exhausted claims. The real world, however, is not so tidy. Sometimes the exhaustion status of a claim is not clear. In *Castille* v. *Peoples*, 489 U. S. 346, 348, 351 (1989), the District Court concluded the claims had not been fairly presented to the state courts, the Court of Appeals concluded they had, and this Court concluded they had not. Three years after the federal petition was filed, see *id.*, at 347, this Court remanded for still further consideration of the state-law question of whether the claims were procedurally barred. See 142 Cong. Rec. 7798 (1996) (remarks of Sen. Specter) (criticizing this case).

The way to avoid the wastefulness of extended litigation over exhaustion is to encourage petitioners to file claims of doubtful exhaustion status in state court rather than federal court. The state court either decides the merits, clearing the way for federal review under § 2254(d), decides the claim is defaulted, requiring the petitioner to meet the "cause and prejudice" standard of *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977), or both, see *Harris* v. *Reed*, 489 U. S. 255, 264, n. 10 (1989), requiring petitioner to clear both hurdles.

The path to this straightforward approach was cleared by this Court's generous interpretation of the tolling provision earlier this term in *Artuz* v. *Bennett*, 531 U. S. __ (No. 99-1238, Nov. 7, 2000). Some circuits had held that a state application was not "properly filed," and hence did not toll the statute, if it was untimely under state law. See, *e.g.*, *Dictado* v. *Ducharme*, 189 F. 3d 889, 892 (CA9 1999). *Bennett* held that procedural bars as to the claims in the application did not render the application itself improperly filed. See *Bennett*, 531 U. S. __

(slip. op., at 5-6). After *Bennett*, petitioners with claims of dubious exhaustion status can file them in state court and receive a state-court ruling on the state-law procedural bar question without fear of the statute running.[6]

The natural complement to *Bennett*'s encouragement to file these claims in state court is a discouragement to file them in federal court. That discouragement is provided by the statute of limitations, with no tolling for prior, dismissed federal petitions. The Court of Appeals in the present case said, "Our interpretation merely avoids penalizing state prisoners who properly have filed federal habeas petitions and are awaiting a response from the court." *Walker* v. *Artuz*, 208 F. 3d 357, 361 (CA2 2000). Unexhausted petitions may be "properly filed" in the broad sense of *Bennett*, but they are contrary to a strong, century-old federal policy, see *Rose* v. *Lundy*, 455 U. S. 509, 515-516 (1982), which Congress has vigorously reaffirmed in the very act in question here. See 28 U. S. C. § 2254(b).

While a habeas petitioner should not be "punished" for filing a federal petition with unexhausted claims in violation of this policy, as the Court of Appeals says, neither should he be rewarded. The general rule is that a dismissal of a case without prejudice leaves the plaintiff in, at best, the same position as if no suit had been filed. See *United States* v. *State of California*, 932 F. 2d 1346, 1351 (CA9 1991), aff'd, 507 U. S. 746 (1993); *Lambert* v. *United States*, 44 F. 3d 296, 298 (CA5 1995); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2367, pp. 323-324, and n. 12 (2d ed. 1995) (voluntary dismissal); 8 J. Moore, Moore's Federal Practice §§ 41.33[6][d] (voluntary), 41.34[6][f] (by stipulation), 41.50[7][b] (involuntary) (3d ed. 1998). As applied specifically to statutes of limitations, the general rule which applies in the absence of a saving statute is that the limitations period is not tolled by a suit which is dismissed. See *Willard* v. *Wood*, 164 U. S. 502, 523

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6. The problem of pre-*Bennett* cases in circuits which followed the contrary rule is addressed in part IV, *infra*.

(1896); *Alexander* v. *Pendleton*, 8 Cranch (12 U. S.) 462, 470 (1814).

> "In other words, a suit dismissed without prejudice is treated for statute of limitations purposes as if it had never been filed. [Citations.] Were this not the rule, statutes of limitations would be easily nullified. The plaintiff could file a suit, dismiss it voluntarily the next day, and have forever to refile it. The strongest case for the rule that the running of the statute of limitations is unaffected by a dismissal without prejudice is therefore the case in which the plaintiff procured the dismissal, as by voluntarily dismissing the suit. [Citations.] But that cannot place limits on the scope of the rule, since a plaintiff can almost always precipitate a dismissal without prejudice, for example by failing to serve the defendant properly or by failing to allege federal jurisdiction, even if he does not move to dismiss it. The rule is therefore as we stated it: when a suit is dismissed without prejudice, the statute of limitations is deemed unaffected by the filing of the suit . . . ." *Elmore* v. *Henderson*, 227 F. 3d 1009, 1011 (CA7 2000).

In habeas cases, the dismissal of the first petition for nonexhaustion leaves the petitioner in no *worse* position than if he had never filed it, as the successive petition rule does not bar his return to federal court after exhaustion. See *Slack* v. *McDaniel*, 529 U. S. __, 146 L. Ed. 2d 542, 551, 120 S. Ct. 1595, 1601 (2000). The other side of the coin is that the petitioner should be in no *better* position than if the first petition had never been filed.

The policy discussion in *Board of Regents* v. *Tomanio*, 446 U. S. 478 (1980) provides an informative comparison and contrast. That case involved a civil rights action under 42 U. S. C. § 1983 and the "borrowed" state statute of limitations. 446 U. S., at 484-485. Plaintiff had pursued a state court action first and then filed in federal court. *Id.*, at 481-482. The borrowed state limitation law had no applicable tolling provi-

sion, *id.*, at 486-487, and the question was whether this no-tolling rule was " 'inconsistent' with the policies underlying § 1983." *Id.*, at 487.

The *Tomanio* Court noted that the remedial policies of § 1983 were not adversely affected by refusing tolling, as plaintiffs had the ability to protect themselves by filing on time. *Id.*, at 488. This is also true in habeas, as discussed *supra*, at 16, where petitioners can protect themselves by going to state court first in all doubtful cases. Next, *Tomanio* noted that Congress had created § 1983 as an independent remedy, *i.e.*, not requiring exhaustion, and a no-tolling rule that effectively forbade consecutive litigation was not inconsistent with this choice. See *id.*, at 489. In habeas, Congress has expressly made the opposite choice and expressly provided the type of tolling denied in *Tomanio*. It is going straight to federal court that Congress has chosen to forbid, or at least severely restrict, and a rule that one who jumps the gun "litigate[s] at risk," *id.*, at 487, is entirely consistent with this policy. The fact that this rule will occasionally cause petitioners to lose the litigation is also entirely consistent with the policy of the statute as a whole, including its limitation period. See *id.*, at 488.

The Congressional policy is clear. Exhaust state remedies first, then and only then go to federal court. The policy is advanced by denying tolling for a prior, dismissed federal petition.

IV. Equitable tolling is available to deal with harsh results in pre-*Bennett* cases.

The rule suggested in the preceding sections of this brief, in combination with the rule of *Artuz* v. *Bennett*, 531 U. S. __ (No. 99-1238, Nov. 7, 2000), lays out a clear path for petitioners to follow. That is, file all claims in state court first until they are clearly exhausted, even if arguably defaulted, and only then file in federal court. *Amicus* acknowledges, however, that this path was not clear before *Bennett* in some circuits.

Before *Bennett*, a prisoner in a Ninth Circuit state might not have filed in state court a claim he had not "fairly presented" to any state court, but which he believed was procedurally defaulted. Under *Dictado* v. *Ducharme*, 189 F. 3d 889 (CA9 1999), the clock would continue to run while the state court considered the "exhaustion" petition if it ultimately decided that the petition was untimely. Such a petition was not deemed "properly filed" after *Dictado* and before *Bennett*. See *id.*, at 892. With this state of the law, the petitioner would go ahead and file in federal court, trying to meet one of the exceptions to the procedural default rule. If the federal court disagreed with the petitioner's assessment of the state default rule, he could find his petition dismissed for nonexhaustion with no time to file another.

This is where equitable tolling comes in. There is a "rebuttable presumption" that equitable tolling applies to most statutes of limitation, see *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95-96 (1990), although it "is not permissible where it is inconsistent with the text of the relevant statute." *United States* v. *Beggerly*, 524 U. S. 38, 48 (1998).

In most cases, equitable tolling for a prior federal petition would be inconsistent with at least the purpose, if not the text, of the statute. By providing tolling for state petitions, Congress has implicitly decided to exclude it for prior federal petitions. Cf. *Beggerly*, *supra*, 524 U. S., at 48 ("knew or should have known" language in statute precluded equitable tolling for plaintiffs who did know). The "already generous" nature of the state petition tolling rule, as construed in *Bennett*, further points away from piling on additional, court-created tolling rules. Cf. *id.*, at 49. Finally, to the extent that equitable tolling is deemed to reflect Congressional intent, Congress presumably acted with the awareness that "Federal courts have typically extended equitable relief only sparingly," *Irwin*, *supra*, 498 U. S., at 96, and that tolling principles "do not extend to . . . a garden variety claim of excusable neglect." *Ibid.*

Detrimental reliance on since-overruled precedent would seem to be one of the few occasions for this sparingly granted relief. It is analogous, at least from the petitioner's side, to the circumstance of the party misled by the other party. Cf. *Irwin*, *supra*, 498 U. S., at 96. Although tolling should not be allowed in this situation from the date of *Bennett* forward, it should be allowed to petitioners who relied to their detriment on contrary precedent in their circuits before *Bennett*. The purpose of the statute is to move these cases along, see *supra*, at 15, not to set "springes" for petitioners following the path apparently marked by then-controlling precedent. Cf. *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923).

In the present case, the Court of Appeals did not consider Walker's equitable tolling argument. See *Walker* v. *Artuz*, 208 F. 3d 357, 361-362 (CA2 2000). It seems highly unlikely he could qualify. "The equities do not weigh in favor of modifying statutory requirements when the procedural default is caused by petitioners' 'failure to take the minimal steps necessary' to preserve their claims." *Hallstrom* v. *Tillamook County*, 493 U. S. 20, 27 (1989) (quoting *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 466 (1975)). The reasons given by the District Court in its "reasonable time" analysis appear to preclude equitable tolling. Compare App. to Pet. for Cert. 15a-16a, with *Elmore* v. *Henderson*, 227 F. 3d 1009, 1013 (CA7 2000). Even so, that question should not be addressed initially in this Court but should instead remain open on remand.

CONCLUSION

The decision of the United States Court of Appeals for the Second Circuit should be vacated and the case remanded for consideration of the equitable tolling argument.

January, 2001

Respectfully submitted,

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IN THE
Supreme Court of the United States

GEORGE DUNCAN, *Petitioner*,

v.

SHERMAN WALKER, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF MASSACHUSETTS, ALABAMA, DELAWARE, HAWAII, IOWA, MARYLAND, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, OHIO, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, AND WEST VIRGINIA IN SUPPORT OF THE PETITIONER

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Question Presented

Whether a prior federal habeas corpus petition is an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2), which provides that the one-year statute of limitations for federal habeas corpus petitions set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is tolled during the pendency of such an application.

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No. 00-121

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Statement of *Amici* Interest

The Commonwealth of Massachusetts, together with the other *amici* states, join the State of New York in urging the Court to reverse the judgment of the Court of Appeals for the Second Circuit and hold that, under 28 U.S.C. § 2244(d)(2), the statute of limitations for federal habeas corpus petitions filed by state prisoners is not tolled during the pendency of a prior federal habeas corpus petition.

The central reason that the Court should reject the lower court's interpretation of the tolling provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which

provides that the one-year statute of limitations is suspended during the pendency of a "properly-filed application for State post-conviction or other collateral review," is simply that the words of the statute do not provide for tolling during prior federal habeas review. It stretches both grammar and logic to pluck the words "other collateral" from the phrase "State post-conviction or other collateral review," declare that they are not modified by the word "State," and conclude that Congress therefore must have intended silently to refer to *federal* collateral review. The words of the statute demonstrate that Congress provided for tolling only during the pendency of *state* review proceedings, which, unlike prior federal proceedings, advance the case towards finality by exhausting state court remedies and serve the further purpose of comity by affording state courts the first opportunity to consider prisoners' federal claims.

The *amici* states have an interest in an interpretation of the tolling provision that does not promote the filing of unexhausted federal habeas corpus petitions. The statutory scheme under AEDPA encourages prisoners promptly to begin the exhaustion process in state court, and it provides an incentive for speedy state court filing by allowing tolling of the statute of limitations during the time that a properly-filed state proceeding is pending. To read into the statute a similar provision for tolling during prior *federal* habeas corpus petitions would provide an incentive for prisoners to do exactly the opposite: file first in federal court, regardless of whether their claims have been exhausted, and delay state court filing until receiving a ruling from the federal court. The incentive for prompt state court filing would be removed, and the prisoner could simply mark time in federal court, knowing that, if the court found his claims unexhausted, he still would be able to commence a state court exhaustion process. Such a scheme promotes unnecessary federal habeas corpus litigation, requires expenditure of state resources to defend duplicative habeas petitions, prolongs the exhaustion process, and conflicts with the

Court's teaching in *Rose v. Lundy*, 455 U.S. 509, 520 (1982), requiring prisoners to evaluate their claims for exhaustion *before* bringing them to federal court.

Summary of Argument

I. The plain words of 28 U.S.C. § 2244(d)(2), as amended by AEDPA, the tolling provision of AEDPA's statute of limitations, refer only to applications for "State" collateral review. Not only does the phrase "application for State post-conviction or other collateral review" contain no reference to federal habeas corpus petitions, but the positioning of the words "post-conviction or other collateral" between the adjective "State" and the noun it modifies, "review," makes this the only natural reading of the phrase. The reasoning of the court of appeals, that a silent reference to "federal" collateral review must be read into the section because the phrase "other collateral" review otherwise would be meaningless, is based on the incorrect assumption that Congress could not have used broad language to ensure that the great variety of state collateral proceedings were included in the tolling provision. Moreover, the lower court's reading is inconsistent with the entire section, adopting a one-year statute of limitations subject only to limited tolling during proceedings that promote exhaustion and advance the case towards finality. By broadening the circumstances in which tolling is permitted, the lower court's interpretation would foster delay and piecemeal litigation, a result contrary to the statutory scheme.

II. Reading § 2244(d)(2) in accordance with its plain meaning to apply only to state proceedings is also consistent with the statute as a whole. The amendments enacted by AEDPA, including the one-year statute of limitations, restrictions on second or successive petitions, and a standard of review that gives greater deference to state-court decisions, reflect the goals of streamlining and accelerating the habeas review process, while

recognizing interests of comity. To toll the statute of limitations during *state* review proceedings furthers these goals, as it encourages petitioners to begin the state court exhaustion process promptly and hastens the final resolution of the case. On the other hand, to read into the statute a tolling provision for *federal* review proceedings would have the opposite result: it would encourage petitioners to delay commencement of the state exhaustion process and instead to file unexhausted petitions in federal court. In addition, Congress explicitly used the word "Federal" on several occasions in AEDPA to refer to federal proceedings, indicating that it is unlikely Congress would have intended a silent reference to federal habeas corpus in this instance.

III. The purposes of AEDPA, as shown by the statute itself as well as by its legislative history, strongly support reliance on the plain meaning of § 2244(d)(2). There can be no question that a central goal of the statute, as amended by AEDPA, is to expedite federal habeas corpus review. The delay and piecemeal litigation that would be encouraged by allowing tolling for prior federal habeas corpus petitions is entirely contrary to this statutory purpose. Moreover, to encourage filing of unexhausted claims in federal court contravenes the holding of *Rose v. Lundy*, 455 U.S. 509, 520 (1982), which advises petitioners *not* to bring claims to federal court until they are sure they have complied with the exhaustion requirement.

IV. The existence of a wide variety of state review proceedings gives meaning to Congress's phrase, "State post-conviction or other collateral review." Thus, the lower court's assumption that Congress could not have intended these words to refer only to State proceedings is erroneous. The terminology given to state post-conviction proceedings varies from state to state, and some are expressly labeled "post-conviction review" petitions. The older forms of review, including habeas corpus

and coram nobis, may not be considered to fall into this category based on their nomenclature. And certainly, collateral proceedings reviewing non-criminal forms of detention, such as civil commitments, could not be termed "post-conviction."

V. If the Court reaches the issue, it should hold that equitable tolling does not apply to AEDPA's statute of limitations. Because the statute provides explicitly for tolling during State review proceedings, and where it also includes equitable considerations in defining the events that trigger the commencement of the statute of limitations, it is plain that Congress did not intend to permit additional factors, not among those specified in the statute, to toll the limitations period.

VI. If the Court reaches the issue, it also should hold that a district court may not stay a federal habeas corpus petition while the petitioner returns to court to exhaust his claims. Such a procedure is contrary to the holding of *Rose v. Lundy*, 455 U.S. 509, 522 (1982) that unexhausted petitions must be dismissed and that mixed petitions may be dismissed or amended to exclude the unexhausted claims. To allow federal petitions to be stayed or held in abeyance during the exhaustion process would encourage piecemeal litigation and would contravene AEDPA's statute of limitations.

Argument

In its decision below, the court of appeals interpreted the tolling provision of the statute of limitations in the federal habeas corpus statute, 28 U.S.C. § 2244(d)(2), which tolls the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) during the pendency of an "application for State post-conviction or other collateral review," as applying not only to state post-conviction proceedings, but also to prior federal habeas corpus proceedings. *Walker v. Artuz*, 208

F.3d 357, 359-61 (2d Cir. 2000). The court concluded that the words "other collateral" would be meaningless unless they were interpreted to mean "federal collateral." *Id.* at 360.

The lower court's decision contravenes the plain words of §2244(d)(2), it is inconsistent with the statute as a whole and with its goals, and it ignores the wide variety of state collateral proceedings that Congress ensured would be encompassed within the tolling provision by its choice of broad, alternative descriptions.

I. BY ITS PLAIN TERMS, § 2244(d)(2) REFERS ONLY TO APPLICATIONS FOR *STATE* REVIEW.

There can be no question that the plain words of 28 U.S.C. § 2244(d)(2), as amended by AEDPA, refer only to applications for "State" collateral review. AEDPA's statute of limitations provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d) (emphasis added).

The plain language of 28 U.S.C. §2244(d)(2) cannot be read to support the court of appeals' decision. *See United States v. Wells*, 519 U.S. 482, 490 (1997) (natural reading is the first criterion in the interpretive hierarchy). "[S]tatutory language must always be read in its proper context. In ascertaining the plain meaning of a statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (citations omitted), *quoted in Sperling v. White*, 30 F.Supp.2d 1246, 1250 (C.D.Cal. 1998).

Here, there is simply nothing in the plain words of the phrase, "application for State post-conviction or other collateral review," that naturally may be read to refer to federal collateral relief. The syllogism that the court of appeals used to reach this conclusion is strained at best: because there is no meaningful

difference between state "post-conviction" and state "collateral" remedies, the lower court posited, it must be assumed that Congress intended the phrase "other collateral" to be a silent reference to "federal collateral" review. *Walker*, 208 F.3d at 359-61. Not only was the lower court's premise erroneous, as described below,[1] but the court's analysis ignored the plain words of the phrase and their natural import. Where the words "post-conviction or other collateral" appear together, sandwiched between the adjective "State" and the noun that the whole phrase modifies, "review," the plain and natural reading of this phrase is that it refers to *state* review only.

Such a conclusion is consistent with the interpretation given the statute by the United States Courts of Appeals for the Third, Fifth and Ninth Circuits, each of which has held that the limitations period of 28 U.S.C. §2244(d)(1) is not tolled during the pendency of a petitioner's prior federal habeas corpus petition. *See Jones v. Morton*, 195 F.3d 153, 158-159 (3d Cir. 1999); *Grooms v. Johnson*, 208 F.3d 488, 489 (5th Cir. 1999); *Jiminez v. Rice*, 222 F.3d 1210, 1213-14 (9th Cir. 2000). This interpretation is also consistent with opinions of the United States Courts of Appeals for the Fifth, Tenth and Eleventh Circuits, which have concluded that petitions for *certiorari* to the Supreme Court do not constitute "other collateral review," as they are not petitions for "State" review, s*ee Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999), *cert. denied,* 120 S.Ct. 1834 (2000); *Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir. 1999), *cert. denied,* 120 S.Ct. 808 (2000), *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000); and with the opinions of most district courts that have addressed the issue.[2] The authors of these decisions all conclude

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[1]See argument IV below.

[2]*See, e.g., Rupert v. Johnson*, 83 F.Supp.2d 801, 804 (W.D.Tex 1998) (for purposes of tolling under §2244(d)(2), federal habeas petition does not constitute "other collateral relief"); *Sperling v. White*, 30 F.Supp.2d 1246,

that the plain and natural reading of § 2244(d)(2) is that the word "State" modifies the entire phrase following it, including both "post-conviction" and "other collateral" review.[3]

A natural reading of the phrase need not ignore its logical import in the context of the entire section, which enacted a one-year time limitation, subject only to limited exceptions and tolling. No one disputes that Congress intended to -- and did --

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1253 (C.D.Cal. 1998) (§2244(d)(2) "plainly does not toll limitations during the pendency of federal habeas petitions"); *Kethley v. Berge*, 14 F.Supp.2d 1077, 1079 (E.D.Wis.1998) (no tolling under §2244(d)(2) for time that unexhausted claims in federal habeas petition were pending in District Court); *Harrison v. Galaza*, 1999 WL 58594, at *2 (N.D.Cal. 1999) ("[t]he running of the limitation period is not tolled, as petitioner contends, for the time period during which a properly filed application for post-conviction or other collateral review is pending in federal court"); *Vincze v. Hickman*, 1999 WL 68330, at *1 (E.D.Cal. 1999) ("the court concludes that the statutory tolling provision set forth in Section 2244(d)(2) does not toll the period during the pendency of petitioner's first federal habeas petition"); *Davis v. Cambra*, 1998 WL 738003, at *2 (N.D. Cal. 1998) ("[t]he time during which a properly filed application for post-conviction or other collateral review is pending in federal court does not toll the running of the one-year statute of limitations"); *Babcock v. Duncan*, 1997 WL 724450, at *2 (N.D.Cal. 1997) ("[n]o court has found that the running of the limitations period also is tolled . . . for the time period during which a properly filed [habeas corpus petition] is pending in federal court"). *But see Barrett v. Yearwood*, 63 F.Supp.2d 1245, 1250 (E.D.Cal.1999) (the "plain meaning" of §2244(d)(2) "is that the statute of limitations is tolled during the pendency of any properly filed federal habeas corpus petition").

[3]That this is the natural reading of § 2244(d)(2) is further confirmed by the agreement of the authors of a treatise "written from the procedural perspective of prisoners," that "federal habeas corpus proceedings do not themselves toll AEDPA's statute of limitations." *See* 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 1.1 at 2; § 5.1b at 229-30 n.57 (3d ed. 1998 & Supp. 1999) (emphasis omitted); *accord* Fallon, Meltzer, Shapiro, Hart & Wechsler, *The Federal Courts and the Federal System* (Supp. 1999) 162; Lawrence Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buffalo L. Rev 381, 387 (1996).

toll the statute of limitations during the pendency of a properly-filed state application for collateral review. It would be surprising if even the respondent did not agree that this Congressional intent extended to the full panoply of state court vehicles for attacking the judgment of conviction or other confinement, whatever the local terminology for such relief. Stopping the clock for a broad range of state court remedies makes sense in light of the longstanding interests, recognized by habeas corpus jurisprudence and legislation, in comity and exhaustion of state court remedies. *See, e.g., Ex parte Royall*, 117 U.S. 241 (1886); *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971). Thus, the natural import of the words themselves, referring to any and all such state court remedies, is also logical in the context of the entirety of § 2244(d), imposing a one-year statute of limitations, subject to only limited exceptions and tolling. On the other hand, to read the words "other collateral" as a silent reference to "federal collateral" review is to broaden the circumstances in which tolling is permitted, and makes no sense in the context of the section itself, since "[a]pplying §2244(d)(2) to a federal petition does nothing to further Congress's intent to promote exhaustion of state relief." *Jiminez v. Rice*, 222 F.3d at 1214. Moreover, such a re-writing of the statute would foster delays in federal habeas corpus cases, a result plainly contrary to the overall statutory scheme and the purpose of the statute of limitations to accelerate the habeas corpus process. *See Hardin v. Straub*, 490 U.S. 536, 539 (1989).

Finally, a "cardinal principle of statutory construction . . . [is] to give effect, if possible, to every clause and word of the statute." *Williams v. Taylor*, 120 S.Ct. 1495, 1519 (2000). "Judges should hesitate . . . to treat statutory terms [as surplusage] in any setting." *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994), *quoted in Jiminez v. Rice*, 222 F.3d at 1212-14. The lower court's interpretation of § 2244(d)(2) would do just that: it would render the word "State" superfluous. And if, contrary

to the *amici* states' argument, the word "collateral" were viewed as wholly synonymous with, and merely repetitive of, the phrase "post-conviction," the words "other collateral" would also be superfluous. The lower court's analysis is simply contrary to the plain language of the statute.

II. CONSTRUING § 2244(d)(2) AS LIMITED TO STATE PROCEEDINGS IS CONSISTENT WITH THE STATUTE AS A WHOLE.

While it is not necessary to look beyond the plain words of 28 U.S.C. § 2244(d)(2) to glean its meaning, reading the section to apply only to state proceedings is also consistent with the overall statutory scheme enacted under AEDPA.

The statute itself imposes several means to streamline and speed up federal habeas corpus review, including not only the statute of limitations contained in § 2244(d), but also limitations on second or successive petitions and a standard of review designed to give greater deference to state courts' legal conclusions and factual findings. 28 U.S.C. §§ 2244(b), 2254(d)-(e). Tolling the statute of limitations during exhaustion proceedings in state court, which serve the interests of comity as well as causing the case to progress towards finality, is wholly consistent with this statutory scheme, as it encourages prisoners promptly to begin the exhaustion process and puts the case "on track" to a final conclusion. To read into the statute a tolling provision for prior federal habeas corpus petitions, however, makes no sense at all in light of the statutory scheme. Such a provision would encourage prisoners to *delay* commencement of the state exhaustion process by filing unexhausted claims in federal court and encourage -- rather than discourage -- multiple, piecemeal collateral attacks on state convicitons and sentences via federal habeas corpus actions. Requiring the states to defend duplicative and unnecessary habeas petitions, where in general

the only result is to send the prisoner to state court to exhaust his claims, contravenes the statutory scheme to encourage prompt state filings and advance the case towards finality.

Reference to other sections of AEDPA, moreover, makes it particularly evident that Congress's omission of any reference to "federal" proceedings in § 2244(d)(2) was intentional. On numerous occasions, Congress made explicit reference to "federal" proceedings. *See* 28 U.S.C. § 2254(I), referring to ineffective assistance of counsel "during Federal or State collateral post-conviction proceedings"; § 2261(e), referring to ineffective assistance of counsel in capital cases "during State or Federal post-conviction proceedings" and to appointment of counsel "at any phase of State or Federal post-conviction proceedings"; § 2264(a)(3), referring to facts that could not have been discovered "in time to present the claim for State or Federal post-conviction review." That, in the tolling provision of § 2244(d)(2), Congress included a reference to "State" review, but made no reference at all to "federal" proceedings, indicates that it did not intend silently to include tolling for federal collateral proceedings.

This conclusion is supported by the canon of statutory construction, *expressio unius est exclusio alterius*. That is, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *see Jiminez v. Rice*, 222 F.3d at 1213-14; *cf. Lindh v. Murphy*, 521 U.S. 320, 330 (1997) (because Congress specifically provided that the AEDPA applies to pending capital cases, but failed to address the AEDPA's application to pending non-capital cases, the negative implication of Congress's failure was that Congress did not intend that the AEDPA apply to pending non-capital cases). Thus, even if the

word "State" in this context were deemed ambiguous, the inclusion of the word "Federal" elsewhere to refer to federal proceedings clarifies that the use of "State" alone indeed was intended to denote *only* state proceedings. *See generally United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). It may be inferred from the many explicit references to "Federal" proceedings in other sections of AEDPA that Congress would "have used language more obviously targeted" to include federal proceedings had it so intended. *See Martin v. Hadix*, 527 U.S. 343, 354 (1999).

Similarly, "[u]nder the principle *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Brogan v. United States*, 522 U.S. 398, 403 n.2 (1998) (citations omitted), *quoted in Sperling v. White*, 30 F.Supp.2d at 1253 & n.9. Applying this principle, the phrase, "a properly filed application for State post-conviction or other collateral review," limits the definition of the general words "other collateral review" by the more specific words "State post-conviction" review. Thus, the words "other collateral review," read in the context of the sentence as a whole, naturally denote other *state* collateral review proceedings and should not be read to refer to an entirely new class of non-state or federal proceedings.

III. LIMITING TOLLING TO TIMES WHEN STATE PROCEEDINGS ARE PENDING FURTHERS THE GOALS OF AEDPA, AS SHOWN BY THE STATUTE ITSELF AS WELL AS ITS LEGISLATIVE HISTORY.

Both the provisions of AEDPA itself and its legislative history reveal a purpose to expedite federal habeas corpus review. *See* H.R. Conf. Rep. No. 104-518, at 11 (1996), *reprinted in* 1996

U.S.C.C.A.N. 944 (AEDPA amendments intended to "curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases," as well as to require exhaustion of state remedies and deference to state court decisions that meet the new standard); H.Rep. No. 104-23 at 29 (one purpose of AEDPA's habeas corpus reform was to "curb the lengthy delays in filing that now often occur in federal habeas corpus litigation). Moreover, the need to bring cases to finality without unnecessary delay is not limited to capital cases. Victims of crime and their families, witnesses, and the community have a need for finality and closure in criminal cases in general. *Cf. Custis v. United States*, 511 U.S. 485, 497 (1994) ("'Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures' and inevitably delay and impair the orderly administration of justice.") (quoting *United States v. Addonizio*, 442 U.S. 178, 184 n.11 (1979)).

To adopt the plain meaning of § 2244(d)(2) is wholly consistent with AEDPA's purpose promptly to bring cases to finality. To limit tolling to state collateral proceedings serves the purposes of finality by stopping the habeas clock *only* for review proceedings that advance the case towards a final conclusion. Nothing in AEDPA suggests that Congress intended to delay the final resolution of a case by encouraging petitioners to go automatically or repeatedly to federal court, without first exhausting state court remedies. Yet this would be the result if tolling were permitted for prior federal habeas corpus petitions. Contrary to the holding of *Rose v. Lundy*, 455 U.S. 509, 520 (1982), in which the Court directed petitioners to "be sure [they] have taken each [claim] to state court" before bringing it to federal court, *id.* at 520, providing for tolling during prior federal habeas petitions would encourage petitioners to make federal court their first stop. There would be no need for a petitioner to evaluate his or her claims for exhaustion prior to filing in federal court, since the clock would stop as soon as the petition was filed,

exhausted or not. From the petitioner's point of view, it would be foolish *not* to bring unexhausted claims to federal court first, in the hope that the defect would go unnoticed and with the assurance that, in any event, nothing would be lost. Moreover, if the petitioner wished to buy additional time prior to filing in state court, he could simply file a series of unexhausted petitions in federal court, tolling the statute indefinitely. *See Jones v. Morton*, 195 F.3d at 159; *Sperling v. White*, 30 F.Supp.2d at 1251.

Such a scenario is wholly contrary to the interests of finality and expedition of federal habeas corpus review. Litigation of unexhausted petitions adds another step in the process of collateral review that delays, rather than expedites, the progress of the case towards finality. Defense of unexhausted petitions also requires the expenditure of state resources. In states such as Massachusetts, where the local district attorneys handle all state court appeals and post-conviction motions filed in state court, the attorney general must request the file from the local district attorney, often requiring retrieval from a storage facility, and then review it for the first time. When the petitioner has failed to present his claims to the state courts, not only have the state courts been deprived of the first opportunity to rule on the issue, but the local prosecutor has not reviewed the claim, and coordination of effort is required between the state and local prosecutors in order to ensure that all relevant facts and considerations are marshaled. It is far preferable, as Congress evidently recognized, to create a strong incentive for petitioners to go immediately to state court to exhaust their claims, where the local authorities and courts most familiar with the matter may consider it in the first instance. *See Duncan v. Henry*, 513 U.S. 364, 365-366 (1995); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Jiminez v. Rice*, 222 F.3d at 1214. When this has occurred, the process of federal habeas review of the state court decision, within the one-year limitations period, is not only more efficient, but it is informed by the earlier state court review process. Most

importantly, where petitioners go directly to state court, the time during which the unexhausted petition would otherwise have been pending in federal court -- a proceeding that does nothing to promote finality and simply delays the state exhaustion process -- is not lost.

While it is true that AEDPA permits a federal district court to deny the petition on the merits, rather than dismiss for failure to exhaust, 28 U.S.C. § 2254(b)(2), such a process should not be frequently used because it deprives state courts of the first opportunity to pass on the claim and because commencing the review process in federal court bypasses the informed judgment of the state courts most familiar with the case. In light of the principles of comity, it appears that this section was intended to conform § 2254 to existing rules providing for summary denial of those cases in which the claim is plainly meritless on its face. *See* 28 U.S.C. § 2243; Rule 4, Rules Governing Section 2254 Cases in the United States District Courts (2000). The existence of this option in no way suggests that filing of unexhausted claims speeds up the federal review process or that Congress intended to encourage all petitioners to commence their exhaustion process in federal, rather than state, court.

In addition to the House Report setting forth the general goals of AEDPA, there is some evidence from remarks and testimony during Congress's consideration of AEDPA that the tolling provision was intended to apply to state proceedings only. One such reference is particularly clear: in testimony before the House of Representatives Judiciary Committee, Daniel E. Lungren, then-Attorney General of California, proposed the very scheme that Congress adopted: "one suggested modification to improve [the statute of limitations] would be to begin the clock from the finality of judgment on direct appeal with perhaps a tolling period for *state* collateral review." Revised Crime Bill: Before the House Committee on the Judiciary Subcommittee on

Crime, 104th Cong., (January 19, 1995) (emphasis added). That Congress was aware of the varied nature of state collateral proceedings is also evident from remarks of Sen. Spector during the Senate debate: "[h]abeas corpus proceedings arising from Federal convictions are handled slightly differently than those arising out of State convictions, because in State proceedings, after the highest State court affirms the death penalty on direct review, there may then be additional State-court review called *collateral review on State habeas corpus* before review on Federal habeas corpus." 141 Cong. Rec. § 7803-01 (June 7, 1995) (emphasis added); *see also* 141 Cong. Rec. § 7803-01, § 7825-26 (Sen. Orrin Hatch, June 7, 1995) (appearing to describe a state petition for clemency as a form of collateral review, but distinct from judicial post-conviction review). In contrast to the references to state collateral proceedings, *amici* states are unaware of any indication in the legislative history that suggests Congress was considering tolling the limitations period during *federal* collateral proceedings.

IV. THE EXISTENCE OF A WIDE VARIETY OF COLLATERAL STATE PROCEEDINGS GIVES MEANING TO CONGRESS'S PHRASE "STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW."

Perhaps the greatest shortcoming of the court of appeals' reasoning was its assumption that there can be no meaningful distinction between the phrases "post-conviction . . . review" and "collateral review." *See Walker v. Artuz*, 208 F.3d at 360 ("Because 'post-conviction review' is a broad term that seems to encompass all review a prisoner seeks after conviction, we can see no reason why Congress should have believed that there were 'other' forms of 'collateral review' that did not come within the scope of 'post-conviction review.'"). It was this assumption that caused the lower court to reject the most natural

and plain reading of § 2244(d)(2) and, in effect, re-write it to comprise "federal" collateral review. The existence of a wide variety of collateral state proceedings, not all of which may be considered or uniformly described as "post-conviction," however, makes it entirely reasonable for Congress to have used this broad terminology to ensure that *all* state collateral remedies, whatever their local terminology, and whether or not they followed a "conviction," were encompassed within AEDPA's tolling provision.

The phrase "post-conviction . . . review" has no application to state review of non-criminal forms of custody, such as civil commitments, and in some states it is a statutory term that, without the clarifying phrase "or other collateral review," could have led to confusion about Congress's intention to include all collateral remedies, regardless of their nomenclature. On the other hand, referring first to "post-conviction" remedies made it clear that the commonly-used statutory forms of relief designated "post-conviction" were included in the tolling provision, as well as the collateral remedies that employed older terminology, such as habeas corpus. *See* Lawrence Yackle, *Post-Conviction Remedies* §13 (1981 & Supp. 2000) (describing remedies expressly termed "post-conviction" and others employing different terminology such as habeas corpus); *Williams v. Taylor*, 120 S.Ct. at 1501 (state habeas corpus referred to as "state collateral relief); *Pennsylvania v. Finley*, 481 U.S. 551, 556, 557, 559 (1987) (statutory remedy under Pennsylvania Post Conviction Hearing Act referred to as "post conviction review").

Congress's choice of the broad phrase "other collateral review" obviated any need to catalog the numerous and varied state court remedies. For example, in Massachusetts a prisoner may bring a state civil habeas corpus petition -- a collateral procedure as mentioned by Senator Specter -- to obtain his release from "a lawfully imposed sentence [that] has expired," or when

his claim is based on "grounds distinct from the issues at the indictment, trial, conviction, or sentencing stage." *Stewart, petitioner*, 411 Mass. 566, 568, 583 N.E.2d 854, 856 (1992) (*quoting Averett, petitioner*, 404 Mass. 28, 30-31, 533 N.E.2d 1023, 1024 (1989)). A properly filed state habeas petition would constitute "other collateral review." Still another Massachusetts example of "other collateral review" would be the "gatekeeper" procedure under Mass. Gen. Laws ch. 278, § 33E, utilized to seek an appeal from the denial of a motion for new trial in a first degree murder case. *See Phoenix v. Matesanz*, 189 F.3d 23, 26 (1st Cir. 1999); *Dickerson v. Latessa*, 872 F.2d 1116, 1117-1118 (1st Cir. 1989). In both instances, the means to further state review is actually filed as a separate action collateral to the underlying criminal case and separate from the "State post-conviction" remedy of a motion for new trial.

The lower court's reasoning also fails to recognize the historical context applicable to collateral attacks on state convictions and sentences in state courts. In 1955 a Uniform Act dealing with state court collateral attacks by state prisoners against their sentences and convictions was endorsed by the National Conference of Commissioners on Uniform Laws in that organization's ongoing effort to standardize state practice among the States. A limited number of states adopted this Act, but in 1966 the Uniform Act was significantly revised to take into account a broad range of pronouncements of the Supreme Court. Again, a number of states adopted the new act. In *Case v. Nebraska*, 381 U.S. 336, 337 (1965) (Clark, J., concurring) and *id.* at 340 (Brennan, J., concurring), two justices expressed their opinions that due process required a post-conviction remedy. This in turn led many states to adopt the Uniform Postconviction Procedure Act. *See generally* Donald E. Wilkes, *State Post-Conviction Remedies and Relief* 67-117 (1996).

While the enactment of the Uniform Postconviction Procedure Act by various states was intended to regularize collateral proceedings attacking a conviction or sentence, and thus provide a safe harbor from federal habeas attack on the procedural mechanism employed by any given state, the Act is clear that it was in no way intended to usurp the primary role to be accorded the trial and direct appeal process. *See, e.g.*, Iowa Code §§ 822.2 and 822.8. Prior to enactment of this new statute-based form of collateral action known as "postconviction relief," there simply was no comprehensive system in many states for a defendant to collaterally attack a criminal conviction by claiming that a conviction was obtained or a sentence was imposed in violation of constitutional rights. *See, e.g., State v. Mulqueen*, 188 N.W.2d 360, 362 (Iowa 1971) ("prior to enactment of [Chapter 822], postconviction relief in Iowa was confined to a judicially expanded concept of habeas corpus").

A post-conviction relief action, or "PCR" as it is commonly known in many states, is essentially a special name for a hybridized form of statute-based collateral attack on a conviction or sentence filed by a state prisoner in a state trial court after a direct appeal. A statute-based PCR incorporates key elements of two common law perogative writs -- habeas corpus (you have the body) actions and coram nobis (before us) proceedings -- in an attempt to codify collateral attacks on state court convictions and sentences. In a traditional habeas corpus action, one court was asked to overturn the conduct or jurisdiction of the convicting court. Coram nobis, by contrast, was more akin to a motion to reconsider, with the original trial court re-examining its conduct or the facts.

Because not all states have enacted some variation of the Uniform Postconviction Procedure Act, it makes perfect sense that Congress, in recognition of the wide variance in collateral actions made available to habeas petitioners among the various

states, would be careful to acknowledge the diversity inherent in our federal system.

V. IF THE COURT REACHES THE ISSUE, IT SHOULD HOLD THAT AEDPA'S STATUTE OF LIMITATIONS IS NOT SUBJECT TO EQUITABLE TOLLING.

Where Congress expressly provided in AEDPA for tolling of the statute of limitations under specified circumstances, and where it included further equitable provisions delaying the commencement of the limitations period, its inclusion of these express provisions make it plain that Congress did not intend equitable tolling to apply to AEDPA's statute of limitations.

As this Court has recently stated, "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *United States v. Beggerly*, 524 U.S. 38, 48 (1998). Although Congress is presumed to be aware of the general application of equitable tolling principles to statutory filing deadlines, *id.* at 679; *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985)), and for this reason there is "a 'rebuttable presumption' that equitable tolling applies to a given statute," *id.* at 679 (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)), that presumption is overcome where there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *Id.* at 679 (quoting *United States v. Brockamp*, 519 U.S. 347, 350 (1997) (emphasis in original)). This is the case here.

In enacting this new statute of limitations under AEDPA, Congress explicitly delineated both the events that trigger the running of the statute, 28 U.S.C. § 2244(d)(1), and the circumstances under which the statute may be tolled, 28 U.S.C. § 2244(d)(2). Moreover, both the statute itself and its legislative

history reveal that a central purpose of the AEDPA amendments was to encourage the timely disposition of Federal habeas corpus petitions. *See Fisher v. Johnson*, 174 F.3d 710, 713 & n.10 (5th Cir. 1999) (statute of limitations reflects legislative purpose to curb abuse of the writ and "speed up the habeas process"); *Sperling v. White*, 30 F.Supp.2d 1246, 1251, 1253 (C.D.Cal. 1998) (noting remarks by sponsor Sen. Orrin Hatch to the effect that "Act's purpose was to set strict time limits in habeas cases, reduce delay, and ensure finality"); *cf. Felker v. Turpin*, 518 U.S. 651, 664 (1996) (restrictions on successive petitions restrict abuse of writ); *Williams v. Taylor*, 120 S.Ct. 1479, 1523 (2000) (new standard of review under AEDPA "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court").

The same purposes are made clear in the House of Representatives Conference Report. *See* H.R. Conf. Rep. No. 104-518, at 11 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944 (noting AEDPA amendments intended to "curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases," as well as to require exhaustion of state remedies and deference to state court decisions meeting new standard).

That AEDPA specifically delineates the limited circumstances in which the one-year limitations period may be tolled, as well as providing in detail for the events that trigger the running of the statute, provides more than "good reason to believe" Congress did *not* intend that other, equitable considerations would toll the running of the statute. *See Giles v. United States*, 6 F.Supp.2d 648, 650 (E.D.Mich. 1998) ("the detail of § 2255 . . . indicates that Congress did not intend to permit courts to read other unmentioned and open-ended equitable exceptions into the statute), *aff'd*, 2000 WL 1720730

(Nov. 8, 2000); *United States v. Beggerly*, 524 U.S. 38, 48 (1998) (equitable tolling inconsistent with text of Quiet Title Act, which already allowed for equitable tolling until plaintiff knew or should have known of action); *United States v. Brockamp*, 519 U.S. 347, 350-53 (1997) (highly detailed and technical statute of limitations for tax refund claim "cannot easily be read as containing implicit exceptions"); *cf. United States v. Reccko*, 151 F.3d 29, 34 (1st Cir. 1998) (applying maxim *expressio unius est exclusio alterius* in concluding that the commission did not intend exception in sentencing guidelines to be expanded beyond its terms).

This conclusion is strengthened by AEDPA's core purposes to narrow the habeas remedy and ensure that habeas corpus petitions reach finality without excessive delay. These purposes are in sharp contrast with those described in *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 426-36 (1965) (interpreting Congressional intent to protect plaintiffs by allowing tolling under Federal Employers' Liability Act during pendency of suit incorrectly filed in state, rather than Federal court). Here, in contrast, the unequivocal legislative history indicating an intent to shorten and restrict the time period for habeas relief, together with the detailed provisions of § 2244(d) making no reference to tolling based on equitable considerations, demonstrate that Congress did *not* want the equitable tolling doctrine to apply. The need for finality on the part of the public, victims of crime, and their families in the face of extremely long delays in the court system adds "special importance" to the narrow interpretation of the statute of limitations under AEDPA. *See Beggerly*, 524 U.S. at 48 (equitable tolling inappropriate where it "would throw a cloud of uncertainty" over the rights of landowners).

Although at least eight circuit courts of appeal have addressed this issue and concluded that equitable tolling applies to AEDPA's statute of limitations, the reasoning of those cases is

unpersuasive. In general, the cases address the issue not as one of statutory interpretation or Congressional intent in accord with the Supreme Court's analysis in *Beggerly* and *Brockamp*, but as a narrow question of jurisdiction. Rather than considering whether Congress intended that equitable tolling apply, the cases simply ask whether the limitations provision is a statute of limitations or, instead, provides a jurisdictional bar. Reaching the obvious conclusion that no jurisdictional bar is imposed, the cases then declare that equitable tolling applies, in most cases without further addressing Congressional intent. *See Smith v. McGinnis*, 208 F.3d 13, 17-18 (2d Cir. 2000) (relying on jurisdiction), *cert. denied*, 121 S.Ct. 104 (2000); *Miller v. New Jersey State Dept. of Corrections*, 145 F.3d 616, 617-19 (3d Cir. 1998) (jurisdiction); *Harris v. Hutchinson*, 209 F.3d 325, 328-30 (4th Cir. 2000) (addressing both jurisdiction and statutory interpretation); *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998) (jurisdiction), *cert. denied*, 119 S.Ct. 1474 (1999); *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000) (adopting equitable tolling under § 2255, but citing *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999), in which the court raised the question of whether "room remains for importing the judge-made doctrine of equitable tolling" in light of AEDPA's express tolling provisions), *cert. denied*, 121 S.Ct. 188 (2000); *Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997) (discussing jurisdiction and legislative history), *cert. denied*, 522 U.S. 1061, 1099 (1998), *overruled on other grounds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir.) (adopting reasoning of *Calderon*), *cert. denied*, 525 U.S. 891 (1998); *Sandvik v. United States*, 177 F.3d 1269, 1271-72 (11th Cir. 1999) (discussing jurisdiction and legislative history in context of §2255); *cf. Moore v. United States*, 173 F.3d 1131, 1134 (8th Cir. 1999) (citing with approval cases adopting equitable tolling based on jurisdiction argument; holding that Fed. R. Civ. P. 6(a) applies to calculation of the starting date of the

running of the statute); *United States v. Cicero*, 214 F.3d 199, 202-203 (D.C. Cir. 2000) (noting majority and minority views on tolling; question not reached as petitioner not entitled to tolling in any event).

Jurisdiction, however, is the wrong question. While it is perfectly true that a jurisdictional bar (as is created by, for instance, missing the deadline for filing a notice of appeal) precludes a court from enlarging the time limit in question, a jurisdictional bar is by no means the only basis for precluding enlargement of a statutory time limit. Even assuming, *arguendo*, that AEDPA's statute of limitations does not impose a *jurisdictional* bar, adopting a judicially-created doctrine of equitable tolling may nevertheless be foreclosed, as here, by traditional principles of statutory construction and legislative intent. *See Beggerly*, 524 U.S. at 48; *Brockamp*, 519 U.S. at 350.

For all these reasons, if the Court reaches the issue in this case, it should hold that Congress did not intend equitable tolling to be applied to AEDPA's statute of limitations.

VI. SIMILARLY, IF THE COURT REACHES THE ISSUE, IT SHOULD HOLD THAT FEDERAL HABEAS PETITIONS MAY NOT BE STAYED PENDING EXHAUSTION IN STATE COURT.

If the Court reaches the issue of a potential stay of federal habeas corpus proceedings while a petitioner returns to state court to exhaust his claims, the Court should hold that such a stay is not permissible under AEDPA.

The exhaustion doctrine of *Rose v. Lundy*, 455 U.S. 509, 522 (1982), does not permit the district court to retain jurisdiction over a federal habeas corpus petition while the prisoner returns to

state court to exhaust his claims. *See Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998) (district court has no authority to hold mixed petition in abeyance pending exhaustion); *Victor v. Hopkins*, 90 F.3d 276, 282 (8th Cir. 1996) (same), *cert. denied*, 519 U.S. 1153 (1997); *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995), *cert. denied*, 516 U. S. 715 (1996). *But see Calderon v. United States District Court*, 144 F.3d 618, 620 (9th Cir. 1998) (district court did not err in holding petition in abeyance). Only the existence of "truly exceptional circumstances" can justify an exception to this rule. *Carmichael*, 163 F.3d at 1045. To hold otherwise would eviscerate the holding of *Rose v. Lundy*, 455 U.S. at 522, and create an administrative nightmare, impermissibly allowing the petitioner "to use the federal district court as a jurisdictional parking lot." *See Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995), *cert. denied*, 516 U. S. 715 (1996). Such a result would undermine AEDPA's statute of limitations and encourage the filing of unexhausted federal habeas corpus petitions.

Conclusion

For the foregoing reasons, the *amici* states respectfully urge the Court to reverse the lower-court decision.

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In the
SUPREME COURT OF THE UNITED STATES

GEORGE DUNCAN

Petitioner

v.

SHERMAN WALKER

Respondent

On Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

BRIEF FOR AMICUS NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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BRIEF OF AMICUS NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

This brief amicus curiae is submitted in support of Respondent Sherman Walker. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief. [1]

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

In NACDL's view, the Second Circuit properly interpreted the tolling provision of 28 U.S.C. §2244(d)(2). That provision tolls the one-year limitations period for state prisoners who file a petition for habeas corpus. The

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[1] As required by Rule 37.6 of this Court, amicus curiae submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than amicus curiae, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

toll operates for the period of time that "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending. . . ." The point of the limitations period is to require state prisoners to press their constitutional claims quickly through the state courts. Prisoners who do all that they can do in submitting their claims to the state courts and then file a habeas corpus petition in federal court (which is what happened here) have followed the purpose and aim of the AEDPA. They should not be penalized by having the time during which they were actively (but erroneously) pressing their premature claims in federal court count against the one-year time "bank" provided in the statute. Deducting the time when a premature federal claim was pending does not advance the goals of the law and sets a totally unfair trap for state prisoners who often proceed pro se and may be confused as to whether their claims were exhausted or not.

For these reasons, Amicus believes that the judgment below should be affirmed and submits this amicus brief to aid the Court in its consideration of the matter.

STATEMENT

Amicus adopts Respondent's statement of the case.

SUMMARY OF ARGUMENT

Section 2244(d)(2) provides for a one-year limitations period for state prisoners bringing habeas corpus petitions. The period in which a state prisoner is actively pursuing state remedies tolls the one-year limitations period. The toll should also operate when a

state prisoner is pursuing federal habeas remedies since such remedies are covered by the statutory language "other collateral review."

More important, this interpretation advances the goals of the limitations provision. The purpose of Section 2244 was to require state prisoners to actively pursue state remedies as quickly as possible and not to delay presentation of their constitutional claims in federal court. If a state prisoner presents his or her state claims and then prematurely files a federal habeas petition (which may contain some unexhausted claims) he or she is not delaying presentation of any federal claim, the very problem which the law was meant to resolve. Since many prisoners act pro se and may rush into federal court prematurely, they should not be penalized for their early entry into federal court, as this Court recognized in a different context in *Slack v. McDaniel*, 529 U.S. 473 (2000).

ARGUMENT

THE LIMITATIONS PERIOD CONTAINED IN SECTION 2244 SHOULD BE TOLLED DURING THE PENDENCY OF A FEDERAL HABEAS CORPUS PETITION OR OTHER FEDERAL ACTION

Section 2244 is a newly enacted provision in the AEDPA. That section generally provides that a state prisoner must actively pursue and exhaust all of his or her state court remedies before filing a habeas corpus petition in federal court. Every day in which he or she is not actively pursuing the available state remedies counts against a one-year limitations "bank." The law provides:

> **(d)(1)** A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. . . . .
>
> **(2)** The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

The question presented in this case is whether the term "other collateral review" encompasses the time during which a state prisoner is pursuing federal habeas review, or does it only cover the time when he or she is in state court, pursuing state remedies. Based on strict analysis of the statutory language, it would appear that the Second Circuit's decision is the correct one. More important, the Second Circuit's holding furthers both the aim and purpose of the new statutory provision.

The problem that the law was designed to solve was the long interval before state prisoners (often facing the death penalty) would bring their claims into federal court on habeas corpus, thereby postponing their execution date. Former Rule 9(a) of the *Rules Governing Section 2254 Cases*, contained a presumptive five-year laches rule which was not, strictly speaking, a limitations period. Since there was no strict time limitation for bringing habeas claims, state prisoners could engage in long delay before pursuing federal remedies.

One of sponsors of the AEDPA, Senator Arlen Specter, explained the purpose of the one-year limitations rule:

> There is [presently] no statute of limitations for filing habeas corpus petitions. This leads inmates who have been sentenced to death to wait until they are facing their imminent execution *before filing their habeas corpus petition in Federal court.* An example of this abuse is the case of Stephen Duffey in Pennsylvania. Duffey murdered his victim in 1984. His conviction was finally upheld by the Pennsylvania courts in 1988. His death warrant was not signed until 1994, 10 years after the murder. It was only when the death warrant was signed by the Governor that Duffey first sought habeas corpus review in Federal court. 142 Cong. Rec. S3471. (April 17, 1996) (emphasis added)

For that reason, Congress placed an important barrier against habeas corpus review being sought by state prisoners who were not actively pursuing their state remedies. This Court recently explained in *Artuz v. Bennett*, 121 S.Ct. 361, 365 (2000) that the purpose of Section 2244 was to promote the "exhaustion of available *state* remedies -- which is the object of § 2244(d)(2)." (emphasis added).

Thus Section 2244(d)(2) can be understand to encourage, indeed, to require, state prisoners to be actively involved in pressing their post-conviction claims in state court. If a state prisoner has been actively doing so and then prematurely files a federal habeas corpus petition containing issues which had not been exhausted in state court, certain consequences follow.

First, as this Court noted in *Slack v. McDaniel*, 529 U.S. 473 (2000), a second petition filed after the first petition was dismissed on exhaustion grounds is not to be treated as a "successor petition," barred under 28 U.S.C §2244(b)(2).

> A petition filed after a mixed petition has been dismissed under *Rose v. Lundy* [455 U.S. 509 (1982),] before the district court adjudicated any claims is to be treated as "any other first petition" and is not a second or successive petition. 529 U.S. at 487.

Second, this Court emphasized that the reason for permitting a subsequent habeas corpus petition to be filed after the first was dismissed on exhaustion grounds was that it recognized the procedural traps confronting a state prisoner, who was often proceeding pro se. This Court noted:

> The proposed rule would bar the prisoner from raising nonfrivolous claims developed in the subsequent state exhaustion proceedings contemplated by the *Rose* [*v. Lundy*] dismissal, even though a federal court had yet to review a single constitutional claim. This result would be contrary to our admonition that the complete exhaustion rule is not to "trap the unwary pro se prisoner." *Rose*, 455 U.S., at 520, (internal quotation marks omitted). 529 U.S. at 487.

But the rule proposed by Petitioner here would totally undermine this Court's decision in *Slack* and create precisely the same "trap for the unwary pro se prisoner" which this Court condemned in that case. Instead of the habeas corpus petition being dismissed on *successor*

grounds, exactly the same type of petition would be dismissed on *limitations* grounds, if the argument put forth by Petitioner is adopted.

This is true because a pro se prisoner in the position of Slack or Respondent would go through the entire state system, believing that their claims had been exhausted. They would then file their habeas petition in federal court, often pro se. The state attorney general would then move to dismiss on the grounds that the claim had not been exhausted. *There is no time limit for a federal court to pass on such an argument, as there is in a death penalty petition.* See 28 U.S.C. §2266. A federal judge could sit on the earlier unexhausted petition for a considerable time, before dismissing the case on exhaustion grounds. [2] By the time the petition was dismissed and the state prisoner either returned to state court to exhaust or filed a new habeas corpus claim with only exhausted claims, the one-year limitations period might well have run, as it did in this case. There is no public policy justification for such a harsh rule.

In a recent interpretation of Section 2244, the Tenth Circuit came to precisely this conclusion. In *Petrick v. Martin*, 236 F.3d 624, 628 (10th Cir. 2001), the Court of Appeals noted:

> Our interpretation is also consistent with the inapplicability of the successiveness rule to a federal petition filed after an initial federal petition is dismissed for failure to exhaust state remedies. When a habeas petitioner returns to federal court

---

[2] In this case, the District Court waited three months before finding that the claims in the pro se petition were not exhausted. See 208 F.3d at 358.

> following exhaustion of his or her claims in state court, the second petition is not barred as successive under § 2244(b) or predecessor successiveness rules. *Slack v. McDaniel,* 529 U.S. 473, 484-89 (2000).

The Court explained the unfairness of any contrary reading of the statutory language.

> Not barring a second, post- exhaustion petition as successive would offer little solace to the petitioner whose second petition is dismissed because the limitations period ran while the first petition was pending in federal court. That petitioners, most often pro se, do bring unexhausted claims to federal court is an unfortunate reality, as is the fact that, due to the volume of habeas litigation, the entire limitations period can run while a petition is pending in federal court before being dismissed. 236 F.3d at 628.

Many courts that have considered the matter have noted the unfairness of any other rule. In this case, the Second Circuit stated that the purpose of the AEDPA would be advanced by reading the statutory language as permitting a toll when a federal habeas petition was pending. It noted:

> Moreover, including federal petitions within the meaning of Section 2244(d)(2) will reward petitioners for filing their federal petitions as soon as possible, thus promoting the statutory objective of efficiency in the review of state criminal judgments. Congress enacted the limitations period to spur defendants to file their federal

> habeas petitions more quickly, and reading the tolling provision to encompass federal court consideration of the petitions furthers this goal. Under our reading of the statute, defendants will have an incentive to file their federal petitions right away because this filing will toll the one-year statute of limitations. This tolling is particularly useful for a petitioner if, upon review, the federal court determines that he must return to state court to exhaust his claims. Meanwhile, if the claims are properly before the federal court, this incentive leads to speedier completion of collateral review. 208 F.3d at 360-61.

The Tenth Circuit also noted that the purpose of the AEDPA would be advanced by recognizing the toll for habeas petitions. It noted in *Petrick*:

> We do avoid an interpretation of the AEDPA that would penalize state prisoners for filing a previous federal habeas petition challenging the same conviction or sentence. A contrary interpretation of § 2254(d)(2) would mean that a diligent prisoner who filed his federal petition the very day after his state conviction became final could still be permanently time barred from habeas relief if the district court delayed before dismissing the petition for failure to exhaust. Such a result would not further the timeliness concerns that § 2244(d) was designed to address and would create yet another situation in which "a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review," something the Supreme Court has sought to avoid [citing *Stewart v.. Martinez-Villareal*, 523 U.S. 637, 645, (1998)]

236 F.3d at 628-29.

For the foregoing reasons, the statutory language, providing for a toll of the one-year limitations period while a state prisoner is pursuing "other collateral review," should be read as covering the time within which a federal habeas corpus petition is pending.

CONCLUSION

For the reasons stated above, the decision below should be affirmed.

Dated: New York, N.Y.
February 12, 2001

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